TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. [redacted]

JOHN MOSES, PLAINTIFF IN ERROR,

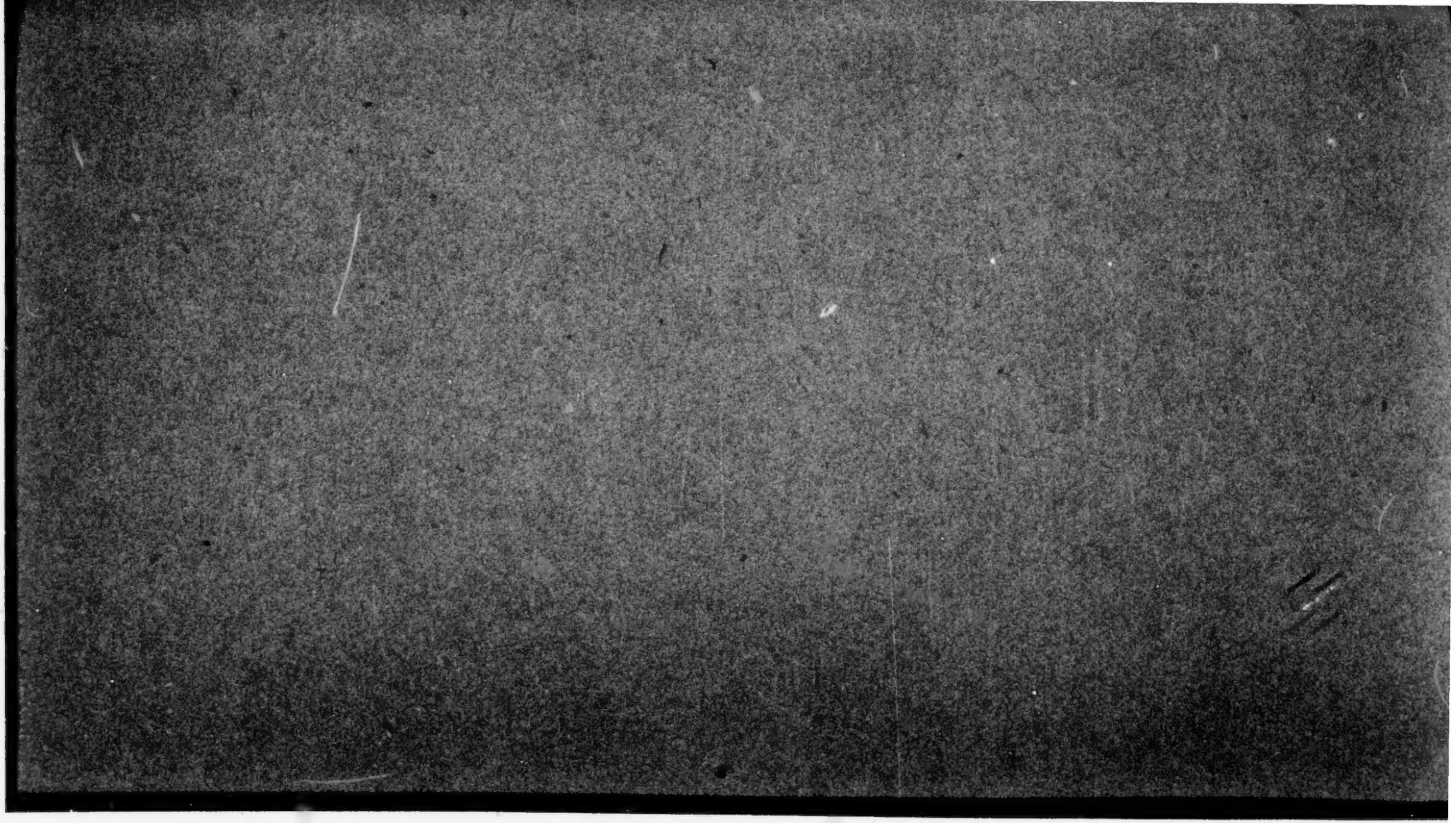
vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED FEBRUARY 3d, 1910.

(FILES.)



(20,588.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 623.

JOHN McLEAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 1, 1907.

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Pleas before the Hon. Styles T. Rowe, judge of the twelfth judicial circuit of Arkansas, of which the Greenwood district f Sebastian county forms a component part when on the tenth day f July, 1906, the following among other proceedings were had and one, to wit:

Caption.

In an action between the

STATE OF ARKANSAS, Plaintiff,
vs.
JOHN MCLEAN, Defendant.

Wherein judgment was rendered against the defendant July 10, 906.

Appearances.

Hon. Ben Cravens for the plaintiff.
Hon. Ira D. Oglesby for the defendant.

Transcript from J. P. Court.

Transcript from Justice Court.

Caption Omitted.

On this 20th, day of June, 1906, comes James Lucas and files ffidavit for warrant of arrest against John McLean alleging on oath hat said John McLean as agent for the Bolen Darnall Coal Company t its mines in Hartford, Arkansas, did run the out put of said mines ver a screen before weighing same detracting from the value thereof, t being a mine where there are more than twenty men employed nderground thereby committing a misdemeanor against the laws f the State of Arkansas, wherefore he prays a warrant of arrest that e be dealt with according to law. Warrant issues for the arrest of ohn McLean, placed in the hands of M. L. Dutton Constable, of Hartford Township with instructions to allow bail in the sum of Four Hundred Dollars for appearance on the 26th day of June, 906.

M. A. DODD, *J. P.*

On this 26th day of June, 1906, this cause coming on to be heard, he State is represented by S. F. Lawrence, and the defendant is resent in person and by attorney. Defendant demurs to affidavit n the ground that it does not state sufficient grounds for an offence. Demurrer is sustained and affidavit amended by State's attorney. A general demurrer is then put in against the amended affidavit nd same is overruled. And trial ensues before the Court sitting as

a jury; and hearing the evidence adduced and argument of counsel for both sides, and being well and sufficiently advised in the premises, doth find that the defendant is guilty of the offence charged in the affidavit.

Therefore, it is considered, ordered and adjudged that defendant pay the State of Arkansas a fine of two hundred dollars for his said offence and as further penalty that he pay all the costs in this prosecution and in default of the payment of said fine and costs,
3 that he be confined in the County Jail of Sebastian County until said fine and costs be paid, not to exceed however, one day for each seventy-five cents of said fine and costs.

M. A. DODD, *J. P.*

On this the 29th day of June, 1906, defendant failing or refusing to pay fine and costs herein assessed commitment issues.

M. A. DODD, *J. P.*

On this the 4th day of July, 1906, comes John McLean by his attorney and files bond for appeal to the Sebastian Circuit Court for the Greenwood District from judgment herein rendered against him.

The Bond is approved by me and it is ordered that said judgment be stayed and commitment be recalled during such time as defendant prosecutes his appeal.

M. A. DODD, *J. P.*

Certificate.

STATE OF ARKANSAS, *County of Sebastian:*

I, M. A. Dodd, Justice of the Peace, in and for Hartford Township of Sebastian County, Arkansas, do hereby certify that the above and foregoing instrument of writing is a true and perfect transcript from my docket of the record of the proceedings and judgment in the above entitled cause, together with all papers and proceedings relating thereto and a correct statement of the costs therein taxed.

Given under my hand as such Justice of the Peace, on this the 9th day of July, 1906.

M. A. DODD, *J. P.*

Endorsed: Filed this 9th day of July, 1906. John E. Tatum, Clerk.

4 *Bill of Exceptions.*

In the Circuit Court of Sebastian County, Arkansas, Greenwood District.

#940.

STATE OF ARKANSAS, Plaintiff,
vs.
JOHN MCLEAN, Defendant.

Be it remembered that on the trial of above cause at the regular July term, 1906, of above Court, the following proceedings were had:

The State and defendant waived trial by jury and by agreement submitted the cause to the Court sitting as a jury, upon the folowing agreed state of facts:

"It is hereby agreed by and between the above named John McLean, Defendant, and the State of Arkansas, Plaintiff, that the following are the true facts in this case:

That the Bolen-Darnall Coal Company is a corporation organized and existing under the laws of the State of Missouri, and is also doing business under the laws of the State of Arkansas, and has complied with the laws of Arkansas permitting foreign corporations to transact and do business within said State.

It is further agreed that said John McLean, Defendant, is the managing agent of the said Bolen-Darnall Coal Company, and as such, has charge of the coal mine of said company situated near Hartford, in Sebastian County, Arkansas.

It is further agreed that the said Bolen-Darnall Coal Company employs more than ten men to work underground in its said mine situated near Hartford, of which the said John McLean is agent and manager.

It is further agreed that the said Bolen-Darnall Coal Company, by and through said John McLean, as its agent and manager, did on the 19th day of June, 1906, in Greenwood District of said Sebastian County, employ one W. H. Dempsey and others, coal miners,
5 to mine coal underground in said mine by the ton, at the rate and price of 90 cents per ton for screened coal, and that the said John McLean in the said District and County did knowingly pass the out-put of coal, so mined and sent up from underground by the said W. H. Dempsey and others, over a screen according to and as provided by a contract between it and the said Dempsey and others, and paid the said Dempsey and others for only the coal that passed over said screen, according to and as provided under this contract, and paid or allowed them nothing for the coal which passed through said screen, part of the value of said coal having passed through said screen, which part of said coal was not weighed or accredited to the said Dempsey and others and for which they received no pay; said coal not having been weighed or accredited to

the said Dempsey or others before the same was passed over said screen, as provided for by the statutes of Arkansas.

It is further agreed that more than ten men were employed and did work under said employment underground in mining coal for the said Bolen-Darnall Coal Company in said mine aforesaid at said time; and it is also agreed that there are coal mines in said State and county operated by both corporations and individuals in which less than ten men are employed underground, by the ton and bushel rates.

It is further agreed that the said John McLean did violate the provisions of Section 1 of Act No. 219, duly passed by the Legislature of Arkansas in 1905, which law went into operation and became effective on the 1st day of April, 1906, as hereinabove set out and the only question herein raised being the validity of said act of the legislature aforesaid, under the law and facts herein."

Upon submission to the Court of the cause upon the foregoing agreed statement of facts, the defendant moved the Court to discharge him because under such agreed state of facts and the law, he was guilty of no offense, which motion the Court overruled, to
6 which action of the Court the defendant at the time excepted.

Thereupon the defendant requested the Court to give and make the following declaration of law: (1) "Under the agreed statement of facts, the defendant is guilty of no offense," which declaration the Court refused to give, to which action of the Court the defendant at the time excepted.

The defendant then asked the Court to make the following declaration of law: (2) "The Act of the Legislature of the State of Arkansas under which defendant is prosecuted, is in violation of Sections 2, 3 and 8 of Article 11 of the Constitution of the State of Arkansas, and defendant should be discharged," which declaration the Court refused to give, to which action of the Court the defendant at the time excepted.

The defendant then asked the Court to declare the law as follows: (3) "The Act of the Legislature of the State of Arkansas under which the defendant is prosecuted and on which the affidavit and information is based, is in violation of the 14th amendment to the Constitution of the United States and is therefore void," which the Court refused to do, to which action of the Court the defendant at the time excepted.

The defendant then asked the Court to make the following declaration: (4) "The Act of the Legislature on which the information is founded, is in violation of Article 5 of the Constitution of the United States," which the court declined to give, to which action of the Court the defendant at the time excepted.

The defendant then asked the Court to give the following declaration of law: (5) "The Act of the Legislature of the State of Arkansas on which the affidavit and warrant of arrest is based, is in violation of the Constitution of the State of Arkansas and is void," which the Court refused to do, to which action of the Court the defendant at the time excepted.

Thereupon the Court under the law and agreed state of facts declared the defendant guilty as charged and assessed his punishment at a fine of $200.00, to which finding and judgment of the Court, the defendant at the time excepted.

And, thereupon, to-wit, on the 23rd day of June, 1906, defendant in open court filed the following motion for new trial:

(Caption Omitted.)

"Comes the defendant by leave of Court and consent of District Attorney first had and obtained and moves the Court to set aside the judgment of conviction in this case and to grant him a new trial because:

1. The Court erred in not sustaining defendant's motion to discharge him.
2. The Court erred in not granting and giving declarations of law, Nos. 1, 2, 3, 4 and 5, the same being asked as separate declarations of law.
3. The judgment and verdict is contrary to law.
4. The judgment and verdict is not supported by the evidence.

IRA D. OGLESBY AND
SPRADLING & DODD,
Attorneys for Defendant."

which motion was by the Court overruled, to which action of the Court in overruling the said motion the defendant at the time excepted and defendant given 90 days in which to file bill of exceptions, all of which proceedings were ordered to be embodied in a bill of exceptions, which is now accordingly done and made a part of the record.

This July 25, 1906.

STYLES T. ROWE, *Judge.*

8

Record Entries.

July Term, 1906.

Caption Omitted.

JULY 10TH, 1906.

Now on this day this cause is submitted to the Court sitting as a jury on an agreed statement of facts and the Court declared that the act under which this prosecution was brought is valid; and the court further finds from the agreed statement of facts that the defendant is guilty of the crime as charged under said act, and doth assess his punishment at a fine in the sum of $200.00.

It is therefore considered, ordered and adjudged by the Court, that the State of Arkansas, do have and recover of and from the defendant John McLean, the said sum of $200.00, her fine, together with all the costs of this prosecution.

And in default of the payment of the said fine and costs, it is further ordered by the Court that the defendant be remanded into

the custody of the sheriff of Sebastian County, and be by him confined in the County Jail of said County until said fine and costs are paid according to law, such period of confinement, not to exceed however, one day for each 75 cents of said fine and costs remaining unpaid, or until the defendant is otherwise legally discharged. To which findings of the Court the defendant at the time excepted and prayed an appeal to the Supreme Court of the State of Arkansas, which prayer for appeal is by the Court granted.

Caption Omitted.

JULY 23RD, 1906.

Comes the defendant by consent of the District Attorney and leave of the Court and files motion for a new trial and to set aside the judgment of conviction and now the Court having duly considered said motion overrules the same to which action of the
9 Court the defendant at the time excepted and is given 30 days in which to file Bill of Exceptions, and now prays an appeal to the Supreme Court which is granted.

10 *Appeal Bond.*

In the Circuit Court of Sebastian County, Arkansas, Greenwood District.

STATE OF ARKANSAS, Plaintiff,
vs.
JOHN MCLEAN, Defendant.

The defendant, John McLean, having prayed an appeal from the judgment of the Circuit Court, for the Greenwood District of Sebastian County, rendered herein against him at its July term, 1906, for a fine of two hundred dollars and costs, now we covenant to and with the plaintiff that, in case said judgment is affirmed, we will pay said fine and costs, and all damages thereon, and the costs of the appeal, and that the defendant will surrender himself in execution of the judgment; or, if he fails to do so, that he will pay to the plaintiff two dollars for each day of the imprisonment adjudged.

Witness our hands this fifteenth day of August, 1906.

JOHN McLEAN,
By IRA D. OGLESBY, *Att'y.*
IRA D. OGLESBY.

Approved:
JOHN E. TATUM, *Clerk.*

11 *Cost Bill.*

J. P. Cost	$3.95
Constable	3.25
Clerk's Cost	2.50
Fine	200.00
Prosecuting Att'y	10.00
Cost of Transcript	2.50
Certificate & Seal	.50
	$222.70

Clerk's Certificate.

STATE OF ARKANSAS, *County of Sebastian:*

I, John E. Tatum, Clerk of the Circuit Court, within and for said County and State do hereby certify that the annexed and foregoing pages contain a true and perfect transcript of all the papers and record entries in the case of the State of Arkansas against John McLean, as therein set forth and as the same appears of record and on file in my office at Greenwood, for the Greenwood District of Sebastian County, Arkansas.

Given under my hand and seal of said Court this 18th day of August, 1906.

[L. S.]

JOHN E. TATUM, *Clerk,*
By R. A. HARPER, *D. C.*

12 *Filing Transcript.*

No. 1139.

JOHN MCLEAN
vs.
THE STATE OF ARKANSAS.

Sebastian, Gr. Dist. Styles T. Rowe, J.

Filed Sept. 3, 1906.

P. D. ENGLISH, *Clerk.*

13 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of May, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 19th day of November, a day of said term:

Request for Oral Argument.

JOHN MCLEAN, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

On request of parties this cause is set for oral argument November 26th, 1906.

14 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth

Monday of November, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 26th day of November, 1906, a day of said term:

Submission.

JOHN MCLEAN, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Appeal from Sebastian Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys and the same is submitted to the court upon the transcript of the record, briefs filed and oral argument of the counsels and is by the court taken under advisement.

15 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November, A. D. 1906, at the Courthouse, in the city of Little Rock, the following proceedings were had, to wit: On the 10th day of December, 1906, a day of said term:

Judgment.

JOHN MCLEAN, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Appeal from Sebastian Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Sebastian County, Greenwood District, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs, and that, unless said appellant shall, within fifteen judicial days, surrender himself to the proper authority in execution of the judgment herein, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this court expended and have execution thereof.

16 In the Supreme Court of Arkansas, December 10, 1906.

McLEAN
v.
STATE.

Reporter State the Facts.

Opinion.

WOOD, *J.*:

This appeal questions the constitutionality of the following statute: "It shall be unlawful for any mine owner, lessee, or operator of coal mines in this State, where ten or more men are employed underground, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employee sending the same to the surface, and accounted for at the legal rate of weights as fixed by the laws of Arkansas, and no employee within the meaning of this act shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions thereof, and any provisions, contract, or agreement between mine owners, lessees or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled, shall be void and of no effect, and the coal sent to the surface shall be accepted or rejected; and if accepted, shall be weighed in accordance with the provisions of this act, and right of action shall not be invalidated by reason of any contract or agreement; and any owner, agent lessee, or operator of any coal mine in this State where ten or more men employed underground who shall knowingly violate any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for each offense, or by imprisonment in the county jail for a period of not less than sixty days nor more than six months, or both such fine and imprisonment; and each day any mine or mines are operated thereafter shall
17 be a separate and distinct offense; proceedings to be instituted in any court having competent jurisdiction."

This legislation is clearly within the scope of the police power. The manifest purpose of the statute is to prevent those who operate coal mines, from perpetrating fraud upon laborers whom they have employed to mine coal *by the quantity*. It will be observed that the act does not interfere with the right of the operator to contract with the miners in his employ for the mining of coal by the hour or day, or in any other manner, regardless of quantity, that he deems proper. He is not compelled to have his coal mined and pay for same according to the quantity produced. But if he elects to employ miners to mine coal and to pay for same according to the quantity produced, then the purpose of this law is to secure the laborer against

the use by him of any screen or other device "that shall take any *part from the value thereof* before the same shall have been weighed and duly credited to the employee" producing same. Under the provisions of the statute, the operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miners. The coal "shall be accepted or rejected." But "if accepted," then it "shall be weighed in accordance with the provisions of the act."

The plain purpose of the act therefore is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded. In other words under this statute, the miner having contracted with the mine owner or operator to produce a bushel, ton, or any other quantity of coal, at a certain price for the quantity produced, is entitled to have such quantity ascertained by the legal rate or system of weights adopted by the State of Arkansas, and that too without having the output or quantity of coal mined, passed over any screen or other device which would take any
18 part from the value thereof" *i. e.* which would reduce, as ascertained by the weight, the quantity of coal which he had actually mined under his contract. It is certainly within the police power of the State to adopt a uniform system of weights and measures and to require that all persons, whose business transactions require the use of same, conform thereto. Ch. CLIX Kirby's Digest. Blaker *v.* Hood, 53 Kan. 509; Wilson *v.* State, 61 Kan. 34; State *v.* Peel Flint Coal Co. 36 W. Va. 802; Freund on Police Power §§272 to 275. The purpose of these statutes as applicable to coal mines is, as said by Mr. Snyder, "to furnish a reliable means upon which to base the miner's compensation and to protect him in the payment for all the coal he mines." He therefore, "not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record kept of it." 2 Snyder on Mines §1675.

The operators are prohibited from using screens or other device "which shall take any part from the value thereof." The words quoted show the intent of the legislature to protect the miner from the use of any device by his employer that will enable such employer to deprive the miner of the value of his labor on the basis of the quantity mined, as per contract.

We see nothing in the statute under consideration that contravenes the provisions in our state and Federal constitutions securing to all persons liberty and equality of rights under the law. State Cons. secs. 2, 3, 8. Fed. Con. 14th. Amendment.

That the law applies only to mine owner, lessee, or operator of coal mines where ten or more men are employed under ground, "does not subject it to the interdiction of the above provisions. The coal industry of our State, on account of the great number engaged in it and dependent upon it for a livelihood, and the still greater number who are affected by it, is of vast importance. Indeed it can be truthfully said to be an industry of great interest to the public if

not affected by a public use. It is eminently proper that the
19 legislature should take supervision over it for the protection and benefit primarily of those who are engaged in it and dependent upon it, and secondarily, for the welfare of those who are incidentally affected by it. This duty has been recognized and entered upon, as evidenced by laws intended to insure, as far as practicable, the safety health and comfort of the miner while engaged in his hazardous employment; and also to insure him, if possible, against any fraud or imposition that might or could be practiced upon him by an unscrupulous employer, if there should be one, who would defraud him of the fruits of his toil. Kirby's Digest secs. 5337 to 5358 inclusive. Legislation of the latter class is as much warranted under the police power as the former. As the object of such legislation is to protect those miners who need protection, from fraud, broad latitude must be given the legislature in the matter of the classification of the mines and miners. The principle announced in the case of Consolidated Coal Co. *v.* People 185 U. S. 203 is applicable here. "In the case under consideration, there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a large scale, or at a greater depth from the surface and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for discrimination here."

The Supreme Court of West Virginia in passing upon a similar clause in a similar statute said: "The distinction drawn in favor of the smaller operators would indicate that the legislature thought that the evils of fraud and danger of imposition did not extend to the smaller classes of operators, and hence the remedy was not extended
to their employees. It is impossible to see how this distinc-
20 tion renders the act amenable to the charge of violating the Fourteenth Amendment of the Federal Constitution" citing Budd *v.* New York, 143 U. S. 517. See State *v.* Peel Splint Co. 36 W. Va. 831. The authorities are quite numerous holding that the legislature may make classifications and discriminations between different classes of corporations and individuals. Likewise that such laws are not open to impeachment by the courts as violative of the 14th Amendment of the Federal Constitution, and the rights of civil liberty and equality, and of contract, guaranteed by State and Federal Constitutions, so long as equal protection is not denied to all persons similarly situated, and where it appears from the face of the act that no unreasonable, arbitrary, or unjust discrimination was intended, or could be effected. Along this line see the many authorities cited in the able brief of counsel for appellee.

We do not consider the cases decided by the Supreme Court of the United States cited and relied upon in the brief of learned counsel

for appellant as applicable to the statute under consideration. We believe the opinion we hold conforms to the decisions of the Supreme Court of the United States. No unjust or unreasonable discrimination against one class of persons or corporations, and in favor of others can be found in this statute, as was found in the statutes in the cases cited, that fell under the condemnation of the supreme court of the United States because repugnant to the 14th Amendment of the Constitution. It must be presumed that the legislature, through the local members from the districts affected especially by the legislation, or its committees appointed for the purpose, received information of the conditions which made such legislation necessary or expedient, and that it intended to put its enactments in the form to meet the requirements.

The act applies to "coal mines in this State, where ten or more men are employed underground." It may be fairly inferred
21 from this language that the legislature considered as *mines* only those places that had been developed to the extent of requiring the labor of ten or more men underground in the work of mining coal. Those places where the development work had been carried on to the extent of requiring the labor of ten men underground were evidently regarded by the legislature as only in the prospective or experimental stage. We have no right to assume from the act that the legislature intended to discriminate against them, but rather that they were not included because they did not need the protection afforded the class mentioned.

Similar laws have been enacted in several of the coal producing states and where tested, have received the sanction of the highest courts of the States, as a valid exercise of police power. Sec. 8786 Dig. Mo. Stat. 1899; Chapter 82 Acts of Leg. W. Va.; State *v.* Peel Flint Coal Co. 36 W. Va. *supra*, secs. 4000-5; Stat. of Kan. 1899; Wilson *v.* State 61 Kan. 34; Sec. 7840, Revised Stat. of Ind.

This court in Woodson *v.* State, 69 Ark. 521 upheld a similar law as to a corporation, under the State constitutional power to amend charter, and to prescribe conditions on which foreign corporations might continue to do business in this State. As the appellant in this case is the agent of a foreign corporation the act could be sustained under the authority of that decision. For we do not find that the present law is so essentially different from that as to require a different ruling, and in the opinion of the court that case announces the correct doctrine.

Finding no error the judgment is affirmed.

22 SUPREME COURT, *State of Arkansas:*

I, Peyton D. English, Clerk of said Court, do hereby certify that the foregoing is a full and complete transcript of the record and proceedings in the case of John McLean *vs.* State of Arkansas, and also of the Opinion of the Court rendered therein, as the same appears on file in my office.

In testimony whereof I have hereunto set my hand and affixed the

seal of said court at my office in Little Rock, Arkansas, this January 11th, 1907.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk of the Supreme Court of Arkansas.

23 Duplicate.

Petition for Writ of Error and Assignment of Error.

In the Supreme Court of the State of Arkansas.

JOHN MCLEAN, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Petition for Writ of Error.

Assignment of Errors and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court of the State of Arkansas in rendering judgment against him in the above entitled case, appellant, John McLean hereby prays a Writ of Error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

And the said John McLean, appellant, in said cause in the Supreme Court of the State of Arkansas, assigns the following errors in the records and proceedings of said case.

The Supreme Court of the State of Arkansas erred in holding and deciding that the judgment and findings of the court below should be sustained and in holding and finding that Act 219 of the Legislature of the State of Arkansas, passed at its regular session, 1905, entitled "An Act to provide for the weighing of coal mined in the State of Arkansas as it comes from the mine and before it is passed over a screen of any kind," under which the plaintiff was indicted and convicted, was not in violation of Article Five of the Constitution of the United States and not in violation of the Fourteenth Amendment to the Constitution of the United States. The validity of said Act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Court erred in sustaining the action of the Circuit Court for the Greenwood District of Sebastian County, Arkansas, in its refusal to give the following declaration of law asked by the defendant (appellant herein) on the trial of said cause, to-wit: "The Act

24 of the Legislature of the State of Arkansas under which the defendant is prosecuted and on which the affidavit and information is based, is in violation of the Fourteenth

Amendment to the Constitution of the United States and is therefore void."

The Supreme Court of the State of Arkansas erred in sustaining the act of the lower court in its refusal to give on the trial of the case the following declaration of law asked by defendant: "The Act of the Legislature on which the information is founded is in violation of Article Five of the Constitution of the United States."

Said Supreme Court erred in not reversing the judgment of the court below and in not discharging defendant (appellant herein).

The Supreme Court of the State of Arkansas erred in declaring in its opinion in this case as follows: "We see nothing in the Statute under consideration that contravenes the provisions in our State and Federal Constitutions securing to all persons liberty and equality of rights under the law. (State Constitution Sections 2-3-8 Federal Constitution, Fourteenth Amendment.)"

The Supreme Court of the State of Arkansas erred in holding and declaring in its opinion delivered in this cause that said Act 219 was valid and legal and in holding in said opinion as follows: "It is certainly within the police power of the State to adopt a uniform system for weights and measures and to require that all persons whose business transactions require the use of same conform thereto."

The Court erred in declaring in its opinion the following: "Likewise that such laws are not open to impeachment as violative of the Fourteenth Amendment of the Federal Constitution and the rights of civil liberty and equality and of contract guaranteed by the State and Federal Constitutions so long as equal protection is not denied to all persons similarly situated, and where it appears from the fact of the act that no unreasonable, arbitrary or unjust discrimination was obtained or could be effected."

25 Said Supreme Court erred in its opinion in holding and declaring that the Act under which the prosecution was begun and appellant convicted was not in violation of the Constitution of the United States by discriminating against mines where ten or more men were employed underground, and that it was lawful to except from the operation of the Act mines where less than ten men were employed underground.

Prayer for Reversal.

For which the said John McLean, defendant in the court below and appellant here, prays that the said judgment of the Supreme Court of the State of Arkansas, dated —— —, 1906 be reversed and a judgment rendered in his favor, and for costs, and that upon his giving bond in compliance with the Statute in such cases made and provided, and as he may be directed, that said Bond and Writ of Error may operate as a supersedeas.

IRA D. OGLESBY,
Attorney for John McLean.

Writ — Error Allowed, &c.

STATE OF ARKANSAS, *Supreme Court:*

Let Writ of Error issue upon the execution of a bond by John McLean, appellant here and defendant in the court below, in the sum of $1000.00 conditioned: That if the judgment of the Supreme Court of the State of Arkansas rendered herein be affirmed by the Supreme Court of the United States, that said John McLean will immediately surrender himself to the Sheriff of Sebastian County, State of Arkansas, in execution of the judgment and sentence of the Circuit Court of the Greenwood District of said county, and that he will perform such judgment and pay all costs that have been or may be adjudged against him and upon giving such bond the judgment of the court be superceded. January 4th, 1907.

JOS. M. HILL,
Chief Justice of the Supreme Court of the State of Arkansas.

[Endorsed:] Duplicate. Filed January 4th 1907 Peyton D. English Clerk.

26 Duplicate.

Copy of Bond.

JOHN MCLEAN, Plaintiff in Error,
vs.
STATE OF ARKANSAS, Defendant in Error.

Bond.

Know all men by these presents that we, John McLean, as principal, and Ira D. Oglesby, Sr., and Ira D. Oglesby, Jr., are held and firmly bound unto the State of Arkansas in the sum of $1000.00, to be paid to the said State of Arkansas, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Witness our signatures and dated this the 4th day of January, 1907.

Whereas the above named John McLean, plaintiff in error, seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas:

Now Therefore; the conditions of this obligation is such that if the above named plaintiff in error shall prosecute his said Writ of Error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his plea, and if he shall immediately surrender himself to the Sheriff of Sebastian County, State of Arkansas in execution of the judgment and sentence of the Circuit Court of the Greenwood District of said County, and will perform

such judgment, then this obligation to be void, otherwise to remain in full force and effect.

JOHN McLEAN.
IRA D. OGLESBY, Sr.
IRA D. OGLESBY, Jr.

Bond approved, and to operate as a supersedeas.

JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.

[Endorsed:] Filed January 4th 1907 Peyton D. English Clerk.

27 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John McLean, appellant, and the State of Arkansas, appellee, wherein was drawn in question the validity of a treaty or statute —, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute, of, or commission held under the United States, and the decision was against the title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of said John McLean, appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be
28 done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller Chief Justice of the United States, the 4th day of January, in the year of our Lord One thousand nine hundred and seven.

[The Seal of the Circuit Court, Western Division U. S. A. of East. Dist. Ark., U. S. A.]

W. P. FEILD,
Clerk Circuit Court United States, Eastern District of Arkansas, Western Division.

Allowed
JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.

29 [Endorsed:] John McLean *vs.* State of Arkansas Writ of Error. (Original) Filed Jan'y 4th 1907. Peyton D. English Clerk

30 SUPREME COURT, *State of Arkansas:*

I, Peyton D. English, Clerk of said Court, do hereby certify that there was lodged with me as such clerk on January 4th, in the matter of John McLean, Plaintiff in Error, *vs.* State of Arkansas, Defendant in Error (1) the original bond, of which a copy is herewith set forth: (2) Two copies of the Writ of Error as herein set forth, one for the Defendant in Error, one to be filed in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Little Rock, Arkansas, this 11th day of January, A. D. 1907.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk of the Supreme Court of Arkansas.

31 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the Unted States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arkansas, wherein John McLean is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 4th day of January, 1907.

JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.

[Seal of the Supreme Court of Arkansas.]

Attest:

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *January 11th*, 1907.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

ROB'T L. ROGERS,
Attorney for Defendant in Error.

Filed Jan'y 4th 1907.
PEYTON D. ENGLISH, *Clerk.*

32 [Endorsed:] John McLean *vs.* State of Arkansas Citation, and appearance of defendant in error (Original).

33 *Clerk's Return.*

UNITED STATES OF AMERICA, *Supreme Court of Arkansas:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Little Rock, this January, 11th, 1907.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk of the Supreme Court of the State of Arkansas.

Fee Bill.

8 filing @ 25	2.00
20 Indexes @ 10	2.00
Manuscript, 21 pages	6.30
2 Certificates & seal	1.00
Marginal notes	2.50
Due by Plf in error	$13.80

For Transcript to U. S. Sup. Ct.
Paid by Plt'ff in error.
Attest:

P. D. ENGLISH, *Clerk.*

Costs in Ct. Ct. See p. 11..... $222.70

Costs in Sup. Court:

Appellee's Brief..... 15.00
Br. Att'y..... 20.00

35.00

Attest:

F. D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 20,588. Arkansas supreme court. Term No. 623. John McLean, plaintiff in error, *vs.* The State of Arkansas. Filed February 25th, 1907. File No. 20,588.

Office Supreme Court, U. S.
FILED.
NOV 23 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN McLEAN,
Plaintiff in Error,

vs.

THE STATE OF ARKANSAS.

No. 29.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

REVISED BRIEF FOR PLAINTIFF IN ERROR.

DANIEL B. HOLMES,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN McLEAN,
Plaintiff in Error,

vs.

THE STATE OF ARKANSAS.

No. 623.

STATEMENT.

This case presents for the decision of this court the constitutionality of the following statute of the State of Arkansas, which went into effect on April 1, 1906, to-wit:

"ACT 219.

"An Act to provide for the weighing of coal mined in the State of Arkansas, as it comes from the mine, and before it is passed over a screen of any kind.

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. It shall be unlawful for any mine

owner, lessee, or operator of coal mines in this state, where ten or more men are employed underground, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employee sending the same to the surface and accounted for at the legal rate of weights fixed by the laws of Arkansas, and no employee within the meaning of this act shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions thereof, and any provisions, contract, or agreement between mine owners, lessees, or operators thereof, and the miners employed therein whereby the provisions of this act are waived, modified or annulled shall be void and of no effect, and the coal sent to the surface shall be accepted or rejected; and if accepted, shall be weighed in accordance with the provisions of this act, and right of action shall not be invalidated by reason of any contract or agreement; and any owner, agent, lessee or operator of any coal mine in this state, where ten or more men are employed underground, who shall knowingly violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for each offense, or by imprisonment in the county jail for a period of not less than sixty days nor more than six months, or both such fine and imprisonment; and each day any mine or mines are operated thereafter shall be a separate and distinct offense; proceedings to be instituted in any court having competent jurisdiction.

"Section 2. This act shall be in force and effect on and after the 1st day of April, 1906, and all laws and parts of laws in conflict with this act are hereby repealed."

The case was tried in the Circuit Court of Sebastian County on the following

AGREED STATEMENT OF FACTS:

"It is hereby agreed by and between the above named John McLean, defendant, and the State of Arkansas, plaintiff, that the following are the true facts in this case:

"That the Bolen-Darnall Coal Company is a corporation organized and existing under the laws of the State of Missouri, and is also doing business under the laws of the State of Arkansas, and has complied with the laws of Arkansas permitting foreign corporations to transact and do business within said state.

"It is further agreed that John McLean, defendant, is the managing agent of the said Bolen-Darnall Coal Company, and as such has charge of the coal mine of said company situated near Hartford, in Sebastian County, Arkansas.

"It is further agreed that the said Bolen-Darnall Coal Company employs more than ten men to work underground in its mine situated near Hartford, of which the said John McLean is agent and manager.

"It is further agreed that the said Bolen-Darnall Coal Company, by and through said John McLean, as its agent and manager, did on the 19th day of June, 1906, in Greenwood District of said Sebastian County, employ one W. H. Dempsey and others, coal miners, to mine coal under ground in said mine by the ton at the rate and price of 90 cents per ton for screened coal, and that the said John McLean in the said district and county did knowingly pass the output of coal, so mined and sent up from underground by the said W. H. Dempsey and others, over a screen according to and as provided by a contract between it and the said Dempsey and others, and paid the said Dempsey and others for only

the coal that passed over said screen, according to and as provided under the contract and paid or allowed them nothing for the coal which passed through said screen, part of the value of said coal having passed through said screen, which part of said coal was not weighed or accredited to the said Dempsey and others and for which they received no pay; said coal not having been weighed or accredited to the said Dempsey or others before the same was passed over said screen, as provided for by the statutes of Arkansas.

"It is further agreed that more than ten men were employed and did work under said employment under ground in mining coal for the said Bolen-Darnall Coal Company in said mine aforesaid at said time; and it is also agreed that there are coal mines in said state and county operated by both corporations and individuals in which less than ten men are employed underground by the ton and bushel rates.

"It is further agreed that the said John McLean did violate the provisions of section 1 of Act No. 219, duly passed by the Legislature of Arkansas in 1905, which law went into operation and became effective on the 1st day of April, 1906, as hereinabove set out and the only question herein raised being the validity of said act of the legislature aforesaid, under the law and facts herein."

The trial court was asked by McLean to declare that the Act of the Arkansas Legislature in question is void as in conflict with both the Fifth and Fourteenth Amendments to the Constitution of the United States, but that court refused to grant the requests.

The defendant McLean was adjudged guilty on this state of facts and fined in the sum of $200.00, and on appeal the judgment against him was affirmed on the following

OPINION OF THE SUPREME COURT OF ARKANSAS:

"Wood, J.:

"This appeal questions the constitutionality of the following statute:

" 'It shall be unlawful for any mine owner, lessee, or operator of coal mines in this state, where ten or more men are employed underground, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employee sending the same to the surface, and accounted for at the legal rate of weights as fixed by the laws of Arkansas, and no employee within the meaning of this act shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions thereof, and any provisions, contract or agreement between mine owners, lessees or operators thereof and the miners employed therein whereby the provisions of this act are waived, modified or annulled shall be void and of no effect, and the coal sent to the surface shall be accepted or rejected; and if accepted, shall be weighed in accordance with the provisions of this act, and right of action shall not be invalidated by reason of any contract or agreement; and any owner, agent, lessee or operator of any coal mine in this state where ten or more men are employed underground who shall knowingly violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for each offense, or by imprisonment in the county jail for a period of not less than sixty days nor more than six months, or both such fine and imprisonment; and each day any mine or mines are operated thereafter shall be a separate and distinct

offense; proceedings to be instituted in any court having competent jurisdiction.'

"This legislation is clearly within the scope of the police power. The manifest purpose of the statute is to prevent those who operate coal mines from perpetrating fraud upon laborers whom they have employed to mine coal *by the quantity*. It will be observed that the act does not interfere with the right of the operator to contract with the miners in his employ for the mining of coal by the hour or day, or in any other manner, regardless of quantity, that he deems proper. He is not compelled to have his coal mined and pay for same according to the quantity produced. But if he elects to employ miners to mine coal and to pay for same according to the quantity produced, then the purpose of this law is to secure the laborer against the use by him of any screen or other device 'that shall take any *part from the value thereof* before the same shall have been weighed and duly credited to the employee' producing same. Under the provisions of the statute, the operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miners. The coal 'shall be accepted or rejected.' But 'if accepted,' then it 'shall be weighed in accordance with the provisions of the act.'

"The plain purpose of the act therefore is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather after they have contracted for its production according to the quantity produced to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded. In other words, under this statute, the miner having contracted with the mine owner or operator to produce a bushel, ton or any other quantity of coal, at a certain price for the quantity produced, is entitled to have such quantity ascertained by the legal rate or system of weights adopted by the State of Arkansas, and that, too, without having the output or

quantity of coal mined passed over any screen or other device which would take any part from the value thereof; i. e., which would reduce, as ascertained by the weight, the quantity of coal which he had actually mined under his contract. It is certainly with the police power of the state to adopt a uniform system of weights and measures and to require that all persons, whose business transactions require the use of same, conform thereto. Ch. CLIX, Kirby's Digest. *Blaker vs. Hood,* 53 Kan., 509; *Wilson vs. State,* 61 Kan., 34; *State vs. Peel Flint Coal Co.,* 36 W. Va., 802; Freund on Police Power, Secs. 272 to 275. The purpose of these statutes as applicable to coal mines is, as said by Mr. Snyder, 'to furnish a reliable means upon which to base the miner's compensation and to protect him in the payment for all the coal he mines.' He, therefore, 'not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record kept of it.' 2 Snyder on Mines, Sec. 1075.

"The operators are prohibited from using screens or other device 'which shall take any part from the value thereof.' The words quoted show the intent of the legislature to protect the miner from the use of any device by his employer that will enable such employer to deprive the miner of the value of his labor on the basis of the quantity mined, as per contract.

"We see nothing in the statute under consideration that contravenes the provisions in our State and Federal constitutions securing to all persons liberty and equality of rights under the law. State Cons., Secs. 2, 3, 8. Fed. Cons., 14th Amendment.

"That the law applies only to mine owner, lessee, or operator of coal mines where ten or more men are employed underground, 'does not subject it to the interdiction of the above provisions.' The coal industry of our state, on account of the great number engaged in it and dependent upon it for a livelihood, and the still greater number who are affected by it, is of vast importance.

Indeed, it can be truthfully said to be an industry of great interest to the public if not affected by a public use. It is eminently proper that the legislature should take supervision over it for the protection and benefit primarily of those who are engaged in it and dependent upon it, and secondarily, for the welfare of those who are incidentally affected by it. This duty has been recognized and entered upon, as evidenced by laws intended to insure, as far as practicable, the safety, health and comfort of the miner while engaged in his hazardous employment; and also to insure him, if possible, against any fraud or imposition that might or could be practiced upon him by an unscrupulous employer, if there should be one, who would defraud him of the fruits of his toil. Kirby's Digest, Secs. 5337 to 5358, inclusive. Legislation of the latter class is as much warranted under the police power as the former. As the object of such legislation is to protect those miners who need protection from fraud, broad latitude must be given the legislature in the matter of the classification of the mines and miners. The principle announced in the case of *Consolidated Coal Co. vs. People*, 185 U. S., 203, is applicable here. 'In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a large scale, or at a greater depth from the surface and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for discrimination here.'

"The Supreme Court of West Virginia, in passing upon a similar clause in a similar statute, said: 'The distinction drawn in favor of the smaller operators would

indicate that the legislature thought that the evils of fraud and danger of imposition did not extend to the smaller classes of operators, and hence the remedy was not extended to their employees. It is impossible to see how this distinction renders the act amenable to the charge of violating the Fourteenth Amendment of the Federal Constitution.' Citing *Budd vs. New York*, 143 U. S., 517. See *State vs. Peel Splint Co.*, 36 W. Va., 831. The authorities are quite numerous holding that the legislature may make classifications and discriminations between different classes of corporations and individuals. Likewise that such laws are not open to impeachment by the courts as violative of the 14th Amendment of the Federal Constitution, and the rights of civil liberty and equality, and of contract, guaranteed by State and Federal Constitutions, so long as equal protection is not denied to all persons similarly situated, and where it appears from the face of the act that no unreasonable, arbitrary, or unjust discrimination was intended, or could be affected. Along this line see the many authorities cited in the able brief of counsel for appellee.

"We do not consider the cases decided by the Supreme Court of the United States, cited and relied upon in the brief of learned counsel for appellant, as applicable to the statute under consideration. We believe the opinion we hold conforms to the decisions of the Supreme Court of the United States. No unjust or unreasonable discrimination against one class of persons or corporations, and in favor of others can be found in this statute, as was found in the statutes in the cases cited, that fell under the condemnation of the Supreme Court of the United States because repugnant to the 14th Amendment of the Constitution. It must be presumed that the legislature, through the local members from the districts affected especially by the legislation, or its committees appointed for the purpose, received information of the conditions which made such legislation necessary or expedient, and that it intended to put its enactments in the form to meet the requirements.

"The act applies to 'coal mines in this state, where ten or more men are employed underground.' It may be fairly inferred from this language that the legislature considered as *mines* only those places that had been developed to the extent of requiring the labor of ten or more men underground in the work of mining coal. Those places where the development work had not been carried on to the extent of requiring the labor of ten men underground were evidently regarded by the legislature as only in the prospective or experimental stage. We have no right to assume from the act that the legislature intended to discriminate against them, but rather that they were not included because they did not need the protection afforded the class mentioned.

"Similar laws have been enacted in several of the coal producing states and where tested, have received the sanction of the highest courts of the states, as a valid exercise of police power. Sec. 8786 Dig. Mo. Stat., 1899; Chapter 82, Acts of Leg. W. Va.; *State vs. Peel Flint Coal Co.*, 36 W. Va., *supra*, Secs. 4000-5; Stat. of Kan., 1899; *Wilson vs. State*, 61 Kan., 34; Sec. 7840, Revised Stat. of Ind.

"This court in *Woodson vs. State*, 69 Ark., 521, upheld a similar law as to a corporation, under the state constitutional power to amend charter, and to prescribe conditions on which foreign corporations might continue to do business in this state. As the appellant in this case is the agent of a foreign corporation the act could be sustained under the authority of that decision. For we do not find that the present law is so essentially different from that as to require a different ruling, and in the opinion of the court that case announces the correct doctrine.

"Finding no error the judgment is affirmed."

The case is now in this court on error to the Supreme Court of Arkansas.

ASSIGNMENT OF ERRORS.

The Supreme Court of the State of Arkansas erred in holding and deciding that the judgment and findings of the court below should be sustained and in holding and finding that Act 219 of the Legislature of the State of Arkansas, passed at its regular session, 1905, entitled, "An Act to provide for the weighing of coal mined in the State of Arkansas as it comes from the mine and before it is passed over a screen of any kind," under which the plaintiff was indicted and convicted, was not in violation of Article Five of the Constitution of the United States and not in violation of the Fourteenth Amendment to the Constitution of the United States. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

(1) The court erred in sustaining the action of the

Circuit Court for the Greenwood District of Sebastian County, Arkansas, in its refusal to give the following declaration of law asked by the defendant (appellant herein) on the trial of said cause, to-wit: "The act of the Legislature of the State of Arkansas under which the defendant is prosecuted and on which the affidavit and information is based, is in violation of the Fourteenth Amendment to the Constitution of the United States and is therefore void."

(2) The Supreme Court of the State of Arkansas erred in sustaining the act of the lower court in its refusal to give on the trial of the case the following declaration of law asked by defendant: "The Act of the Legislature on which the information is founded is in violation of Article Five of the Constitution of the United States."

(3) Said Supreme Court erred in not reversing the judgment of the court below and in not discharging defendant (appellant herein.)

(4) The Supreme Court of the State of Arkansas erred in declaring in its opinion in this case as follows: "We see nothing in the statute under consideration that contravenes the provisions in our State and Federal Constitutions securing to all persons liberty and equality of rights under the law (State Constitution, Sections 2-3-8; Federal Constitution, Fourteenth Amendment)."

(5) The Supreme Court of the State of Arkansas erred in holding and declaring in its opinion delivered in this cause that said Act 219 was valid and legal and in

holding in said opinion as follows: "It is certainly within the police power of the state to adopt a uniform system for weights and measures and to require that all persons whose business transactions require the use of same conform thereto."

(6) The court erred in declaring in its opinion the following: "Likewise that such laws are not open to impeachment as violative of the Fourteenth Amendment of the Federal Constitution and the rights of civil liberty and equality and of contract guaranteed by the State and Federal Constitutions so long as equal protection is not denied to all persons similarly situated, and where it appears from the face of the act that no unreasonable, arbitrary or unjust discrimination was obtained or could be effected."

(7) Said Supreme Court erred in its opinion in holding and declaring that the act under which the prosecution was begun and appellant convicted was not in violation of the Constitution of the United States by discriminating against mines where ten or more men were employed underground, and that it was lawful to except from the operation of the act mines where less than ten men were employed underground.

BRIEF.

I.

MEANING OF ACT NO. 219.

1. The act is not general and is expressly limited in its application to "any mine owner, lessee, or operator of coal mines in this state, *where ten or more men are employed underground*, employing miners at bushel or ton rates, or other quantity." It has no application whatever to any such mine owner, lessee or operator, where *nine or less* men are so employed.

2. The act makes "void and of no effect" any contract between any employer of ten or more underground workmen and an employee whereby the employee is to be paid any agreed price, however liberal and remunerative, for the quantity of merchantable screened coal produced by his labor; where payment is to be made by quantity the only permissible or possible contract is for *unscreened* coal. In other words, the inestimable right of the laborer to contract his labor for the highest obtainable price is thus abridged and taken away, if, as may well be the case

the employer will contract to pay a rate for merchantable screened coal that would yield larger returns for the same labor exerted than could be realized where payment was to be made for inferior unscreened coal. It is manifest, without argument or proof, that the larger the percentage of merchantable coal contained in the coal dug from the coal bank, the greater the value produced for the mine owner and the higher the price he can afford to pay for the labor which produces that result. This abridgment of the right and power to contract is contained in these plain words of the act:

"Any provisions, *contract or agreement* between mine owners, lessees, or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled, shall be void and of no effect."

Indeed the act is construed as above interpreted by the State Supreme Court in the opinion which it handed down, wherein it is said:

"It will be observed that the act does not interfere with the right of the operator to contract with the miners in his employ for the mining of coal by the hour or day, or in any other manner, *regardless of quantity*, that he deems proper. He is *not compelled* to have his coal mined and pay for the same according to the quantity produced. But, *if he elects to employ miners to mine coal and to pay for same according to the quantity produced, then the purpose of this law* is to secure the laborer *against the use* by him *of any screen or other device* that shall take any part from the value thereof *before* the same shall have been *weighed and duly credited* to the employee producing same."

This is but another way of stating that where coal is to be paid for by the quantity mined, the parties interested are not permitted to contract that the same shall be passed over a screen with mesh or apertures of an agreed size and payment made for the quantity of merchantable coal thus separated from the inferior and possibly unsalable slack and refuse.

II.

THE AGREED FACTS.

The following controlling facts were stipulated to exist in this case:

1. The plaintiff in error, John McLean, was, on June 19, 1906, the agent and manager of The Bolen-Darnall Coal Company, a Missouri corporation holding a license to do business in Arkansas, and as such in charge of a coal mine of said company in Sebastian County, Arkansas.

2. On said date, according to and as provided by a contract to that effect between said company and one W. H. Dempsey and others, coal miners, the said McLean, acting for said company, knowingly passed the output of coal mined and sent up from the underground by said miners over a screen and paid them for the screened coal at the contract rate and price of 90 cents per ton for the screened coal, and paid and allowed them nothing for the coal which passed through said screen and which was not weighed or accredited to said miners, all as provided in said contract, and that none of the coal mined

was weighed or accredited to said miners before the same was passed over said screen.

3. At the time aforesaid more than ten men were employed and did work under said employment underground in mining coal in said mine for said Bolen-Darnall Coal Company.

4. At said time there were coal mines in the State of Arkansas and in Sebastian County operated by both corporations and individuals in which less than ten men were employed underground by the ton and bushel rates.

It thus appears that operations at the Bolen-Darnall coal mine were carried on under a contract entered into voluntarily by its miners and that like operations and contracts, at the numerous other mines in the state where less than ten men were employed underground, were in vogue and conceded to be proper and lawful.

III.

THE ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION BY RESTRICTING THE RIGHT TO CONTRACT, BY TAKING PROPERTY WITHOUT DUE PROCESS OF LAW, BY UNLAWFUL DISCRIMINATION AND BY DENYING TO CERTAIN OPERATORS AND WORKERS IN COAL MINES THE RIGHT OF CIVIL LIBERTY AND THE PURSUIT OF HAPPINESS.

No attempt will be made at an exhaustive review of the many Federal and State authorities bearing on the questions which are here presented. The cases are so numerous and subject to so many and varying characteristics distinguishing them from each other that such a review would necessarily be voluminous and tedious, and,

it is believed, not sufficiently profitable to warrant it. This court may be safely depended upon to be familiar with such of its own decisions as may not be specifically referred to, while cases from other jurisdictions, not being authoritative, find their chief value in the strength of their reasoning and illustration. This discussion will, therefore, be confined to those cases only which are believed to be specially pertinent and illustrative of the questions as they are presented by the particular record in this case.

As has been already pointed out, according to the judgment of the Supreme Court of Arkansas, from which this writ of error was taken, and by the express provision of the act itself, the right of both laborer and employer to contract with reference to such labor is materially abridged. This is too plainly manifest from the act itself to warrant elaboration. Its words are these:

"Any provisions, contract or agreement between mine owners, lessees or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled, shall be void and of no effect."

It is said in *Ritchie vs. People*, 155 Ill., 88, that "the words, 'no female shall be employed,' import action on the part of two persons. There must be a person who does the act of employing and a person who consents to the act of being employed. * * * Hence, a direction that a person shall not be employed more than a specified number of hours in one day, is at the same time

a direction that such person shall not be under contract to work for more than a specified number of hours in one day."

Speaking of a law in Colorado which made it unlawful for an employer to permit working men in certain avocations to work exceeding eight hours per day, the Supreme Court of that State (*In re Morgan*, 58 Pac. Rep., l. c., 1072) made use of the following language, which is equally applicable here:

"That it operates as a limitation both upon the employer and employee seems clear. It forbids a certain kind of employment. There can be no employment without the concurring acts of him who contracts for employment and of him who contracts to be employed."

In *Allgeyer vs. Louisiana*, 165 U. S., 578, Mr. Justice Peckham, speaking of the Fourteenth Amendment, said:

"Under that provision no State can deprive any person of life, liberty or property without due process of law. The right *to purchase or to sell* labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."

And in the very recent case of *Adair vs. U. S.*, 28 Sup. Ct. Rep., 277, Mr. Justice Harlan made use of these words:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the

conditions upon which he will accept such labor from the person offering to sell it."

Whatever is said, then, to show that this act is unconstitutional, applies as well to the miner as to the operator; and in spite of the self-assumed guardianship over him by would-be reformers and pseudo-statesmen, it is contended that the miner is as much of a free man—has as much right to his liberty as any other man in any other employment—as the butcher, the baker, the woodchopper, the teamster, the clerk, the carpenter, the mason, the farm laborer, or any other man, no matter what his line of employment, and this right he has in as full measure as have those who, under the guise of this legislation, would deprive him of it. The miner himself would not have a right to bargain away his life, liberty and pursuit of happiness. These rights are inalienable. They are no more alienable by the miner than by those who, for the purpose of introducing the panacea of State guardianship and the extinction of individual rights, pay him the high compliment of saying that he shall be classed with infants, idiots and persons of non-sane memory, and that he does not possess sufficient capacity or intelligence to make his own contracts. or to look after his own best interests in a lawful and beneficial employment.

As is well said by the Supreme Court of the State of Kansas in *State vs. Haun,* 61 Kas., 146:

"Persons *sui juris* need no guardians. Those who

seek to put a protector over labor reflect upon the dignity and independence of the wage-earner, and deceive him by the promise that legislation can cure the ills of which he may complain. Such legislation suggests the handiwork of the politician, rather than of the political economist."

The astounding operation of the statute is well shown in this case. None of the miners employed by the defendant's company are complaining. By the terms of their contracts, their wages are measured by screened coal, in the way they themselves wished to have them determined. Coal mining has always been a lawful occupation in this country. It does not depend for its rights upon any license or authority from the state. It is a highly beneficial industry. Yet, in a matter that has no relation to the health, safety, comfort and morals of the miner in his employment, in a matter of purely private contract between him and the operator, where the miner is satisfied and the operator is content, it is contended under this act that the defendant is guilty of a crime.

The principle under discussion is nowhere more clearly enunciated than in *Ritchie vs. People*, 155 Ill., 88, where it is said:

"The privilege of contracting is both a liberty and property right (*Frorer vs. People*, 141 Ill., 171; 31 N. E., 395). Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts (*State vs. Loomis*, 115 Mo., 307; 22 S. W., 350). The right to use, buy and sell property and contract in respect thereto is protected by the Con-

stitution. Labor is property, and the laborer has the same right to sell his labor and to contract with reference thereto as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor and make contracts in respect thereto upon such terms as may be agreed upon between the parties is included in the constitutional guarantee above quoted. * * * When an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the Constitution. * * * The right to contract is the only way by which a person can rightfully acquire property by his own labor. *Of all the rights of persons it is the most essential to human happiness.*"

A case directly in point is to be found in the case of *Ramsey vs. People*, 32 N. E. Rep., 364, where the Legislature of Illinois enacted a statute requiring coal operators, where the miner is paid on the basis of the amount of coal mined by him, to weigh the coal before it is screened and to compute the compensation upon the weight of the unscreened coal. That statute was the same as this Act 219 in every essential particular and the Supreme Court of that State unhesitatingly declared the law unconstitutional, in the following clear and convincing language:

"In the recent case of *Frorer vs. People* (Ill. Sup.) 31 N. E. Rep., 395, we had occasion to consider another statute passed by the same Legislature, and involving, in the main, the same constitutional principles as the one now before us, and reached the conclusion that the stat-

ute in question in that case is unconstitutional and void. That statute made it unlawful for any person, company, corporation or association engaged in any mining or manufacturing business to engage in, or be interested, either directly or indirectly, in the keeping of a truck store, or the controlling of any store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions or groceries to his, its or their employees, while engaged in mining or manufacturing. We held that said statute was a prohibition, not only upon the employer engaged in mining or manufacturing, but also upon his employees, and took from both the right and liberty belonging to all other members of the community to enter into such contracts, not contrary to public policy, as they may see fit; that the legislature had no power to deprive one class of persons of privileges allowed to other persons under like conditions; that the privilege of contracting is both a liberty and a property right, protected by that provision of the Constitution which guarantees that no person shall be deprived of his liberty or property without due process of law; and that if one person is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which is still allowed to other members of the community, he is deprived of both liberty and property, to the extent that he is thus deprived of the right of contract. We are of the opinion that the same rule, in substance, laid down in the Frorer case, applies here, and we need therefore do a little more than refer to what is said in the opinion in that case. The statute now before us, in like manner with the one under consideration there, attempts to take from both the employer and employee engaged in the mining business the right and power of fixing by contract the manner in which such wages are to be ascertained. The statute makes it imperative, where the miner is paid on the basis of the amount of coal mined, whatever may be the wishes or interests of the parties, that the coal shall be weighed on the pit cars before being screened, and that

the compensation shall be computed upon the weight of the unscreened coal. "In all other kinds of business involving the employment of labor the employer and employee are left free to fix by contract the amount of wages to be paid, and the mode in which such wages shall be ascertained and computed. This is justly regarder as a very important right, vitally affecting the interests of both parties. To the extent to which it is abridged, a property right is taken away. There is nothing in the business of coal mining which renders either the employer or employee less capable of contracting in respect to wages than in any of the other numerous branches of business in which laborers are employed under analogous conditions. There is no difference, at least in kind, so far as this matter is concerned, between coal mining, on the one hand, and the other varieties of mining, quarrying stone, grading and constructing railroads, and their operation when constructed, manufacturing in all its departments, the construction of buildings, agriculture, commerce, domestic service, and an almost infinite variety of other avocations requiring the employment of laborers on the other hand. Upon what principle, then, can those engaged in coal mining be singled out, and subjected to restrictions of their power to contract as to wages, while those engaged in all these other classes of business are left entirely free to contract as they see fit ? We think the attempt of the Legislature to impose such restrictions is clearly repugnant to the constitutional limitation above referred to, and therefore void.

"The conclusion at which we have arrived is entirely in harmony with, if not directly supported by, the case of *Millett vs. People*, 117 Ill., 294; 7 N. E. Rep., 631. The statute under consideration in that case required the owner of every coal mine to furnish and place upon the railroad track adjacent to such mine a track scale, and it was provided that all coal produced should be weighed on such scales, and a correct record kept of the same, to be subject to the inspection of the miner, operator, carrier, landowner, adjacent landowner,

members of the Bureau of Labor Statistics, mine inspectors, and others interested. Said statute provided for the punishment, by fine or imprisonment, of any owner or agent operating a mine for a failure to comply with those requirements, and declared all contracts for mining coal in which the weighing of coal, as thus provided for, should be dispensed with, to be null and void. The defendant, being indicted for a violation of said statute, set up by way of defense, as it would seem, that he had contracted with his miners for fixing their compensation by means other than weighing the coal mined. He was convicted, but on writ of error the judgment of conviction was reversed, this court holding that the provision of said statute declaring such contract void was repugnant to the article of the Constitution which provides that no person shall be deprived of life, liberty, or property without due process of law."

An Act of the Kansas Legislature, likewise almost identical with this Act 219, came before the Supreme Court of that State and was assailed as unconstitutional because it abridged the right of contract between the parties as to the labor of the miner. Although the Kansas statute was not declared to be utterly void, in the case of *State vs. Wilson*, 61 Kansas, 32, the law as above announced by the Supreme Court of Illinois was emphatically affirmed and the statute was allowed to stand in part by the majority of the justices holding by judicial construction, that the Act did not abridge the right of contract and that it was just as lawful *after* the act was passed for the parties to contract that the miner should be paid for his labor according to the weight of the screened coal produced by his labor, as it was before the act was passed. The court was com-

posed of three justices. Mr. Justice Smith, in a lucid opinion, held that the act did abridge the right to contract, and was, therefore, unconstitutional and void. The joint opinion of the other two justices expressly declared that "the law nowise affects the right of contract and does not hinder or prevent the mine operator or miners from making such agreements as they choose concerning the amount of compensation to be paid for labor in mining coal. *Nor does the act * * * make void contracts for the payment of wages based on the quantity of screened coal produced. In fact the law permits complete freedom of action in the respect mentioned,*" and Mr. Justice Johnston in a separate concurring opinion made his position still clearer by saying that "the contention is that the statute * * * interferes with and infringes upon the right to contract, and *if it did, I would readily agree with my brother Smith as well as the Court of Appeals that the act would be invalid.* * * * Nothing in the language of the act *expressly* prohibits or interferes with the freedom of contract. * * * A still more important consideration is that if the meaning sought to be imported into this act is given it would in my judgment destroy its validity. If it be conceded that the statute is ambiguous and open to two interpretations, which should be adopted, the one that upholds, or the one that defeats? The presumption, so far as it can obtain, is that the Legislature did not intend to do a vain thing, or to enact a statute that was ineffectual and invalid. Every presumption is in favor of the validity of

the law, and if there is room for two constructions the court must, in deference to the Legislature, assume that it did not intend to violate the Constitution and should therefore adopt the one which would uphold the validity of its act."

Guided by the principle of construction thus announced, the act was so interpreted by the majority of that court as to escape the constitutional objection made, but the majority of the justices were also agreed that statutes like the one now under consideration which, by its own terms and as interpreted by the Supreme Court of Arkansas, does interfere with or infringe upon the right to contract, are unconstitutional and void.

A similar proposed screen law was introduced into the House of Representatives of the State of Colorado, and pursuant to the Constitution of that State, its validity was submitted to the Supreme Court in advance of its passage, and that learned court (*In re* House Bill No. 203, 39 Pac. Rep., l. c., 432), advised the Legislature of that State that such a bill would be unconstitutional if passed, in the following language:

"While the foregoing question does not specifically point out the particular provisions of the Federal or State Constitution that, in the judgment of the honorable House, prohibits this class of legislation, we infer from the report of the honorable Committee on Revision and Constitution that in its opinion the pending bill is obnoxious to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States,' and also to Section 25 of Article 2 of our Bill of Rights, which provides 'that no person shall be deprived of life, liberty or property, without due process of law.' Insofar as the bill attempts to abridge the right of contract between parties in regard to matters personal to themselves, and to deprive them of the power to fix the mode in which compensation for mining coal shall be ascertained, it is clearly an infringement of these constitutional guaranties."

In *Whitebreast Fuel Co. vs. People*, 51 N. E. Rep., 853, the Supreme Court of Illinois again said:

"It is now insisted that the section in question is an invasion of the constitutional right of the employer and employee to contract with each other as to the compensation of the employee and the manner in which it shall be ascertained, and that it is therefore in conflict with the Constitution. We are not prepared to say that such is the effect of the act. The provision is that the owner or operator of a mine shall pay to the miner 'at such price as may be agreed upon by the respective parties.' It leaves the employer and miner free to contract with each other upon any terms that may be mutually agreeable, without restraint. The agreement may be for a certain rate, according to the time employed or the quantity of coal mined, or upon any other basis. If the compensation is fixed by the amount of coal mined, the act leaves them free to determine the quantity of such coal upon any basis they may see fit. It does not require that it shall be weighed or measured, or compel the parties to adopt any particular mode of ascertaining such quantity. The act does not require that the same price shall be paid for each of the different grades into which the coal may be divided; but only undertakes to require that the employer shall perform his contract by paying at such price as may be agreed upon by the respective parties. We cannot ascribe to the Legislature an intention to

re-enact in a somewhat different form, a provision designed to interfere with the freedom of contracting between citizens, and which has been uniformly held to be an encroachment upon the liberty and rights of the laborer and his employer. Before the passage of this act it had been decided that it was not competent for the Legislature to compel owners and operators of coal mines to make their contracts by the weight of the coal mined or to require the laborer to have his wages determined by weight (*Millett vs. People*, 117 Ill., 294, 7 N. E., 631); that the act for the payment of wages in lawful money and to prevent the truck system was unconstitutional and void, as an attempted deprivation of the liberty and property right of contracting (*Frorer vs. People*, 141 Ill., 171; 31 N. E., 395); that the act requiring the owner and operator of a coal mine to weigh coal in the pit cars before screening, and to pay on such weights, was in violation of the constitution, as an attempt to take from both employer and employee the right to fix, by contract, the amount of wages and the mode in which they should be ascertained (*Ramsey vs. People*, 142 Ill., 380; 32 N. E., 364); and that the Legislature could not take away from coal miners and their employers the right to ascertain and fix upon the amount due for mining coal in any manner mutually satisfactory to them (*Harding vs. People*, 160 Ill., 459; 43 N. E., 624). It appears to have been the design of the Legislature to eliminate from this act the objectionable features of former enactments by making contracts enforceable according to their terms instead of attempting to make contracts for the parties. It is made essential to a violation of this act that a price shall be agreed upon by the respective parties including the various grades of coal specified in the act. In this case a less price was satisfactory to the parties when paid on the basis of 'run of the mine' or unscreened coal than when the payment was made on the basis of the screened product. The statement of facts shows that the defendant complied with the terms of its contract, and paid the miner named in the complaint according to the

understanding of the parties, as was done in the case of *Ramsey vs. People, supra.* In that case the employer, by contract with the miner, paid for the coal mined at a certain price per ton for the screened coal, substantially in the manner in which the appellant was accustomed to pay by an understanding with its miners, and the act requiring payment on the weight of coal before it was screened, regardless of the contract, was held to be in violation of the Constitution. In *Jones vs. People,* 110 Ill., 590, an act to provide for weighing coal at the mines was under consideration, and it was said that the act left it free for the owner or operator of the coal mine to make contracts with the miners to mine coal for whatever might be agreed upon between them, and where the contract was for the paying of wages in some other way than that specified in the act its provisions did not apply. We have reached the same conclusion as to this act, and must hold that its provisions do not apply where there is a contract for the payment of compensation by different means or upon a different basis than that specified in the act. To hold otherwise would render the enactment unconstitutional. It has been uniformly decided that a laborer cannot be deprived of the right to make his own contracts and exercise his own judgment as to how much he will receive for his labor and what he will receive as payment.

"The agreed statement of facts shows that the defendant paid to the miner named in the complaint for the coal mined by him according to the understanding of the parties which had been carried out for six years between them; that the higher price per ton paid for screened lump coal was intended by the parties as payment for the coal mined, and that no price had been agreed upon by the parties for the nut and slack coal, of which no account was taken by them. The conviction was wrong, under the facts. The judgment is reversed and the cause remanded."

To the same effect, see Kellyville Coal Co vs. Harris,

Another case directly in point arose in the State of Missouri, where a law was passed prohibiting any person engaged in manufacturing or mining to issue in payment of the wages of laborers, any order, check, memorandum, token or evidence of indebtedness, payable otherwise than in lawful money of the United States. In *State vs. Loomis*, 115 Mo., l. c. 316, this act was held to be unconstitutional and not due process of law, in the following language:

"Liberty, as we have seen, includes the right to contract as others may; and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen. Applying the principles of constitutional law before stated, we can come to no other conclusion than this, that these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they can stand, it is difficult to see an end to such legislation, and the government becomes one of special privileges instead of a compact 'to promote the general welfare of the people.' We place our conclusion on the broad ground that these sections of the statute are not 'due process of law' within the meaning of the Constitution."

In *Godcharles vs. Wigeman*, 6 Atl. Rep., 354, a similar law was declared unconstitutional for the same reasons by the Supreme Court of Pennsylvania.

On the same ground, the Supreme Court of Illinois, in *Braceville Coal Company vs. People*, 35 N. E.

Rep., 62, declared unconstitutional the law that certain corporations should pay weekly each and every employee engaged in its business the wages earned by such employee to within six days of the date of such payment, and forbidding contracts for others times of payment.

State vs. Julow, 129 Mo., 163, is a very interesting and instructive case. The General Assembly of the State of Missouri had passed a law prohibiting any employer of labor from contracting with the latter to withdraw from or refrain from joining any labor union and making a breach of the law a punishable crime. In holding this statute void as interefering with the constitutional right of private contract, the Supreme Court of that State said:

"These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil and political; in short, all that makes life worth living; and of none of these liberties can anyone be deprived, except by due process of law * * *

"Here, the law under review declares that to be a *crime*, which consists alone in the exercise of a constitutional right, to-wit, that of terminating a contract, one of the essential attributes of property, indeed, property itself, under preceding definitions. Brought to the bar of a court on such a charge, the accused would have been *prejudged* insofar as the *criminality* of the act charged is concerned; no question could there be made or admit-

ted as to the quality of the act; that would have been settled by the previous legislative declaration, and it would only remain to find the fact as charged, in order to declare the guilt as charged. *But the fact as charged,* as already seen, *is not a crime and will not be a crime, so long as constitutional guarantees and constitutional prohibitions are respected and enforced.*"

A similar ruling has been made by the Supreme Court of California. The city of Los Angeles passed an ordinance making it punishable misdemeanor for a person engaged in performing a contract with the city to demand, receive or contract, for more than eight hours labor in one day from a person. In *Ex parte* Kubach, 24 Pac. Rep., 737, the court in declaring this ordinance unconstitutional and void, said:

"It is claimed in support of the petition (for a writ of habeas corpus), that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services and is a direct infringement of the right of such persons to make and enforce their contracts."

Another very instructive case has recently occurred in the State of Illinois. The legislature of that State passed a law placing restrictions on the assignment of wages, income or salary, and this was declared to be unconstitutional and void as an infringement of the right of contract in an able opinion filed October 26, 1908. This

opinion not yet having been reported, the same is here printed in full for the convenience of the court:

"In the Supreme Court of Illinois, June Term, A. D. 1908. Perry J. Massie, Appellee, vs. Charles E. Cessna, Appellant.

"Opinion by DUNN, J., filed October 26, 1908.

"Mr. Justice Dunn delivered the opinion of the court:

"This appeal comes directly from the Circuit Court of Cook County, and presents the question of the constitutionality of the statute of May 13, 1905, 'in relation to the assignment of wages, income or salary,' (Laws of 1905, p. 79) which reads as follows:

" 'Sec. 1. No assignment of the wages or salary of any person shall be valid, so as to vest in the assignee any beneficial interest, either at law or in equity, unless such assignment shall be in writing, signed by the assignor and acknowledged in person by the assignor before a justice of the peace in and for the township in which the assignor resides, and entered by such justice upon his docket, and unless within three days from the date of the execution and acknowledgment of such assignment, a true and complete copy of said assignment and of the certificate of its acknowledgment shall be served upon the person, firm or corporation from whom such wages or salary is due or is to become due, in the same manner that the summons in chancery is now required by law to be served: Provided further, that no assignment of wages or salary by a married person shall be valid unless the same is also executed and acknowledged, as above, by the assignor's wife or husband, as the case may be.

" 'Sec. 2. The term 'assignment,' as used in this act, shall include every assignment, transfer, sale, pledge, mortgage or hypothecation, however made or attempted,

of the wages or salary of any person, or of any interest therein.

" 'Sec. 3. Whenever any assignment of the wages or salary of any person or persons shall be given as security for a loan tainted with usury, or shall be given to secure the payment or fulfillment of a usurious contract, or the payment of the principal or the interest of a usurious debt, such assignment shall be absolutely void.

" 'Sec. 4. Every assignment of wages to be earned in whole or in part more than six months from and after the making of such assignment shall be absolutely void.

" 'Sec. 5. Whenever any person, firm or corporation shall bring or threaten to bring any action or suit to enforce any assignment of wages or salary which has not been duly executed, acknowledged and served upon the employer in conformity with the provisions of this act or which is declared invalid by the provisions of this act, courts of equity shall have full power, upon the application either of the assignor of such wages or salary, or of the person, firm or corporation from whom such wages or salary is, or is to become due, to perpetually enjoin the threatened or attempted enforcement of any such assignment, and the fact that the complainant has a complete and adequate remedy at law, shall constitute no defense to the maintenance of a suit in equity for the purposes aforesaid.

" 'Sec. 6. The invalidity of any portion of this act shall not affect the validity of any other portion thereof which can be given effect without such invalid part.'

"The appellee filed his bill for an injunction against the appellant, alleging that he had been for a number of years continuously in the employ of the Inter-Ocean Newspaper Company; that about twelve years ago he commenced a course of dealing with the appellant, who loaned money to wage earners and salaried people at

exorbitant, illegal and usurious rates of interest, which dealings had continued until the present time, and all of which had been usurious; that he had upon a number of occasions borrowed from appellant certain sums of money at ten per cent interest per month, and had repaid to appellant, by way of interest and other moneys, many large sums, for which he had received no credit upon the principal, which sums greatly exceeded the amount of money borrowed, together with legal interest thereon; that there were executed by appellee, at various times, assignments of his wages as security for the payment of the several usurious loans, all of which assignments appellant now holds and has threatened to file with appellee's employer, thereby intending to compel appellee to comply with appellant's unlawful and usurious demands. The bill further alleges that in February, 1907, as a transaction wholly separate and apart from the previous dealings with appellant, the appell borrowed $25, for the use of which he agreed to pay two and a half dollars per month as interest until said sum was repaid, and he executed to appellant an assignment of wages to be earned until August 18, 1908, as security for the payment of said sum and interest; that this assignment was given as security for a loan tainted with usury, and was never acknowledged in person, nor before a justice of the peace, nor before any person or official whatsoever, so that by reason of the statute in such case provided it is not valid; that appellant his filed with the Inter-Ocean Newspaper Company a copy of this assignment and now threatens to bring a suit to enforce the same, which would result in great and irreparable injury to the complainant, and the appellant, Cessna, will bring said suit unless restrained from so doing. The prayer of the bill was that all of said assignments of wages now in the hands of the appellant or his agents be cancelled and appellant enjoined from proceeding in any manner to enforce any of the said assignments.

A demurrer to the bill having been overruled, the defendant elected to stand by his demurrer, and a decree was entered in accordance with the prayer of the bill.

"The appellant insists that the statute in question violates section 2 of article 2 of the constitution of the state, which provides that 'no person shall be deprived of life, liberty or property without due process of law.'"

"Due process of law means the same thing as the law of the land, by which we understand a general law acting equally on all persons in like situation. The right to contract is both liberty and property, and the denial of that right in the manner in which it has hitherto been enjoyed, and in which others are still permitted to enjoy it, is a deprivation of both liberty and property. (*Frorer vs. People*, 141 Ill., 171; *Mathews vs. People*, 202 *id.* 389.) Persons have a right to contract as they please in regard to their own labor and to make such terms and agreements as they see fit. (*Kellyville Coal Co. vs. Harrier*, 207 Ill., 624; *Gillespie vs. People*, 188 *id.*, 176.) An assignment of wages, earned or unearned, is lawful. A person has the same right to assign his wages as to sell or mortgage his real or personal property. (*Mallin vs. Wenham*, 209 Ill., 252.) The act in question abridges the freedom of contract of every person who works for wages or a salary. No such person can pledge any part, however small, of his wages, or salary, however large, for more than six months, nor at all, unless hampered with such restrictions as to make the right practically unavailing. Whether such restriction would be for the advantage of the individual in any particular case or in many or most cases is beside the question. The labor or services are those of the individual. The wages or salary to be earned are his property. The right to dispose of them at such time, for such consideration and upon such terms as he sees fit is his, and whether he exercises that right wisely or unwisely, it cannot be

interfered with unless the public safety, health, morals, welfare or comfort requires it.

"In the case of *Mallin vs. Wenham, supra,* we held that an assignment of wages to be earned in the future, under an existing employment, was valid if made for a valuable consideration and free from fraud. The case of *International Text Book Co. vs. Weissinger,* 169 Ind., 353, is pressed upon our attention and is at variance with this view, but we are not inclined to depart from it. It is in the police power alone, which derives its existence from the rule that the safety of the people is the supreme law, that authority can be found for the restriction of the right to make lawful contracts, and such restriction, to be valid, must, in fact, have some relation to the public health, morals, safety or welfare. *People vs. Steele,* 231 Ill., 340; *City of Chicago vs. Netcher,* 183 *id.,* 104; *Ritchie vs. People,* 155 *id.,* 98.

"Our attention is called to the exemption laws of the state, and the various statutes providing for the priority of payment of wages, and authorizing attorney's fees to be recovered in suits for wages, and concerning the employment of labor and payment of wages. Such laws relate only to the remedy for the enforcement of contracts, not to the right to contract. No valid reason affecting the public welfare is shown for imposing upon wage earners and salaried men a disability to contract in regard to their property which does not apply to other persons. All claims for money due or to become due for goods or real estate sold, for money lent, or upon any contract other than for wages or salary, may be assigned or pledged without restriction. There is no substantial difference between men working for wages or receiving a salary and the rest of the community which justifies the legislature in passing an act to restrict the powers of the former in dealing with their property. Section 4 of the act declares void every assignment of wages to be earned, in whole or in part, more than six months after the making of such assignment, and is an

unconstitutional interference with the right of contract. Section 3 declares void every assignment of wages or salary given as security for a loan tainted with usury, or for the payment or fulfillment of a usurious contract, or for the payment of the principal or interest of a usurious debt. Any other security which may be given for a usurious debt is valid to the extent that the debt is valid. The holder of such a debt, and his debtor, may contract for security upon any kind of property except salary or wages.

"The legislature has the power to declare that usury shall avoid all contracts and all securities therefor, but it may not say that some contracts shall be valid and others of the same kind not valid; that a chattel mortgage shall be binding and a real estate mortgage not binding. Section 1 requires in assignments of wages or salary burdensome conditions which do not apply to assignments of other claims of like character and whose imposition is merely arbitrary. The statute, as a whole, was beyond the constitutional power of the legislature to enact.

"The decree will be reversed and the cause remanded to the circuit court, with directions to sustain the demurrer to the bill.

"*Reversed and remanded, with directions.*

"Mr. Justice Smith, dissenting: I think the first section of the act questioned in this litigation is free from constitutional objection."

Refuge for the protection of such legislation from assault on the ground of unconstitutionality is sought here as always by attempting to uphold it under the Police Power of the State. It is, however, confidently submitted that it is impossible to discover wherein the health, comfort, safety or welfare of *society* is pro-

moted by restricting the right of the miner and operator to contract for the labor of the former to be paid for according to the quantity of screened coal produced by him. It even seems absurd to claim (as is the logical consequence from the position of the State) that the health, comfort, safety and welfare of society are in no way endangered by a miner being paid for his labor on the basis of screened coal *where the number of his fellow miners is only eight,* but that the health, comfort, safety and welfare of society become *ipso facto* so seriously threatened the moment such mode of payment is continued with the presence of *only one* more miner at work. With two employers side by side and doing precisely the same thing, the one having *nine* laborers and the other *only ten*, the latter is classed by this act as a criminal, while the former is certified to be an upright and law-abiding man. As might well be expected, the learned decisions of this exalted judicial tribunal, as wells as other courts, lend no countenance to such a claim.

In *State vs. Haun*, 61 Kas., 146, the Supreme Court of that State has very pertinently said:

"It has been sought by some judges to justify legislation of this kind upon the theory that in the exercise of police power a limitation necessary for the protection of one class of persons against the persecution of another class may be placed upon freedom of contract. As between persons *sui juris* what right has the legislature to assume that one class has the need of protection against another? In this country the employee today may be the employer next year, and laws treating employees

as subjects for such protective legislation belittle their intelligence and reflect upon their standing as free citizens. * * * Such laws as the one under consideration classify him among the incompetents and degrade his calling."

The New York Court of Appeals in *People vs. Warden of City Prison*, 51 N. E. Rep., l. c. 1011, has said:

"While it is the general province of the legislature to determine what laws and regulations are needed to protect the public health, comfort and safety, courts must be able to say, upon a perusal of the enactment, that there is some fair and reasonable connection between it and the ends above mentioned. Unless such relation exists, an enactment cannot be upheld as an exercise of the police power. * * *

"Therefore, it is the duty of the courts to examine legislation complained of as in violation of the rights secured to the citizens by the constitution, for the purpose of ascertaining whether the health, morals, safety or welfare of the public justifies its enactment."

In *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S., 757, Mr. Justice Field said:

"Among these inalienable rights, as proclaimed in that great document is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in them-

selves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

"It has been well said that 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith's Wealth of Nations, Bk. I, Chap. 10."

In *Mugler vs. Kansas*, 123 U. S., 623, Mr. Justice Harlan said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty —indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

In *Lawton vs. Steele,* 152 U. S., 137, Mr. Justice Brown said:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that *the interests of the public generally, as distinguished from those of a particular class,* require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In *Allgeyer vs. Louisiana,* 165 U. S., 589, Mr. Justice Peckham said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to *enter into all contracts which may be proper, necessary and essential* to his carrying out to a successful conclusion the purposes above mentioned."

In *Lochner vs. New York,* 198 U. S., 57, in which an act prohibiting bakers to work more than ten hours a day was held to be an unjustifiable interference with the liberty of the citizen, Mr. Justice Peckham stated:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.

"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor, in the occupation of a baker. * * * Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.

"It is a question of which two powers or right shall prevail—the power of the State to legislate, or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. *The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate,* before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

In *People vs. Gillson,* 98 N. Y., 108, Mr. Justice Peckham, now one of the justices of this court, said:

"The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty,' as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

In the case of *Ritchie vs. People,* 155 Ill., 88, where an act which provided that no woman should work in an establishment for the manufacture of clothing more than eight hours in any one day, was held unconstitutional, the court said:

"The police power of the State is that power which enables it to promote the health, comfort, safety and welfare of society. It is very broad and far-reaching, but is not without its limitations. *Legislative acts passed in pursuance of it* must not be in conflict with the constitution, and *must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare or safety of society.* When the ostensible object of an enactment is to secure the public comfort, welfare or safety, *it must appear to be adapted to that end.*

It cannot invade the rights of persons and property under the guise of a mere police regulation, when it is not such in fact; and where such an act takes away the property of a citizen, or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety and welfare of society."

In *Live Stock Dealers' Association vs. Crescent City Association,* 1 Abb. U. S., 388, 15 Fed. Cas., p. 652, Mr. Justice Bradley, sitting in circuit, said:

"There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

Illustrations of the limitations of the power of the State to interfere with ordinary private business under the guise of an exercise of the police power may be found in the case of *In re Aubery,* 78 Pac. Rep., 900, where it is said that the trade of horseshoer is not subject to regulation under such power, and in *Horwich vs. Laboratory Co.,* 68 N. E. Rep., 938, where it is decided that an Act of Illinois providing that where boxes, bottles, etc., bearing the register mark of the owners are found in possession of junk dealers, or dealers in cans, bottles, boxes, etc., such fact shall be *prima facie* evidence of unlawful possession within the meaning of the Act, is invalid and unconstitutional inasmuch as it permits a conviction of these dealers on evidence that would not be sufficient for the conviction of other persons. See also *Liquor Co. vs. Platt,* 148 Fed. Rep., l. c.,

902; *Ruhstrat vs. People*, 57 N. E., 41; *Iron Co. vs. State*, 66 N. E., 1004; and *Fisher Co. vs. Woods*, 79 N. E., 837.

The title of this statute is, "An Act to provide for the weighing of coal mined in the State of Arkansas, as it comes from the mine and before it is passed over a screen of any kind." Supposing this statute to have been intended by its author to promote the comfort, welfare, or safety of society, although there is nothing in its title or in the body thereof to indicate any such purpose, it seems impossible that the requirement that the miner shall be paid on the basis of the weight of coal mined as it comes from the mine rather than after it has been screened, can have any relation whatever to the end sought to be accomplished. And it appears to require the wildest flight of imagination to discover that such a relation exists between such requirement and the ends sought to be accomplished *where ten men* are employed underground, but that no such relation exists *where only nine* men are thus employed.

Before the enactment of this statute the miner had the benefit and advantage of at least two propositions in disposing of his labor at quantity rates. He could propose to work on the basis of screened coal, or he could propose to take his pay on the basis of "mine run" coal. Who can say that this was not a great advantage? Who can say that the men employed do not know better what is to their interets than the wisest legislative assembly that ever convened on earth? And

whose business is it, whose right does it invade, what principle of public policy does it violate, wherein is the welfare *of society* impaired, if these miners accept ninety cents per ton for screened coal? Do not they know whether this is better than any terms they can obtain for mining unscreened coal? Does not their choice determine that the contract which they made is the better? And if that is true, apart from any theory, is it no demonstrated in this case that where the law arbitrarily interferes with the right of a man to contract for his own labor, where it constricts the field in which he may haggle, or limits the propositions he may give or receive, it does so to his injury, by necessarily depriving him of his liberty and plundering him of a portion of his most sacred property right.

IV.

THE QUESTION OF CLASSIFICATION.

Passing without particular comment the fact that this legislation is special and discriminative in that it applies only to operators of coal mines and certain of their employees when there are other callings and persons to whom it might be made applicable with equal reason, the act is clearly unconstitutional and void because of the classification which it adopts of operators and laborers in mines where ten or more men are employed underground, leaving operators and laborers in all other coal mines free to make their own bargains and contracts for labor therein. Otherwise stated, the class-

ification is according to the amount of business carried on in mining coal underground. Such a classification is unreasonable, arbitrary and cannot be upheld.

In order to stand the test of the constitution which guarantees to all persons the equal protection of the laws, the principle on which classification for legislative purposes is made must bear some reasonable relation to the object to be attained by the particular legislation. What would be a proper rule for classification in one kind of statute might be entirely improper in another kind of law. For example, a law which would make the maintenance of fire escapes obligatory only upon the owners of tenement houses exceeding fifty feet in height would be altogether proper, whereas a law requiring sanitary plumbing for the health and safety of occupants of tenement houses, limited in its application by the same provision as to height, would be manifestly arbitrary and unlawful. Again, a law which would make the necessity of inspection of factories to depend upon twenty or more operatives being employed therein would be reasonable, whereas statutes making it unlawful for only the same class of factories to give employment to child labor while other factories could employ children at their own free will would be unnatural, arbitrary and void. As is well said by this court in *Gulf C. & S. F. R. Co. vs. Ellis*, 165 U. S., 150, *"Arbitrary selection can never be justified by calling it classification."*

This act is made applicable only to mine operators *while employing ten or more men* under ground, and if

the operator of more than one mine, then only to the payment to the laborers in the particular mines *in which* ten or more men are employed under ground. In other words, the manner in which the laborers are to be paid, in effect their scale of wages, is made to depend on the amount of business done by the mine operator, just as in *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S., 79, the charges by stock yards companies were made to depend upon the amount of business done. Yet in that celebrated case, which is directly in point here, Mr. Justice Brewer lays bare the illegality, if not the absurdity, of classification on such a basis, in the following words:

"But it is not necessary to rest our decision upon this consideration, which was not fully discussed by counsel, but pass to a question which is of a kindred nature, and in which there is presented no matter of the doubtful construction of statute.

"The act in terms applies only to those stock yards within the State 'which for the preceding twelve months shall have had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep.'

"If the average daily receipts of a stock yard are 100 head of cattle, or 300 head or hogs, or 300 head of hogs, or more than 300 head of sheep, it comes within the purview of this statute. If less than that amount it is free from legislative restriction. No matter what yards it may touch today or in the near or far future, the express declaration of the statute is that stock yards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount

of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be reasonable for the services, or if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.

"The possibility of such legislation suggests the warning words of Judge Catron, afterward Mr. Justice Catron, of this court, when in *Vanzant vs. Waddell*, 2 Yerg. 262, 270, he said:

" 'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar

consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"The Fourteenth Amendment forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws.' The scope of this prohibition has been frequently considered by this court.

"In *Gulf, C. & S. F. Co. vs. Ellis*, 165 U. S., 150, 159, in which was presented solely the question of classification, we said, referring to many cases, both State and national:

" 'But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo. vs. Hopkins*, 118 U. S., 356, 369: "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon

the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.'"

At another place in the opinion, the learned justice uses the following language, every word of which is pertinent to the act now being discussed:

"There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business while not regulating another who does the same but less business, than all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its *indirect* results affects different individuals or corporations differently, nor with those in which a classification is based upon *inherent* differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the *quantity* of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

The case of *State vs. Haun*, 61 Kansas, 146, may be cited in this connection as a real authority because the quotation to be made from it has also been made and

expressly endorsed by this court as a correct exposition of the law in *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S., 79, where it was said:

"We think, therefore, that the principle of the decision of the Supreme Court of Kansas in *State vs. Haun*, 61 Kas., 146, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the Fourteenth Amendment."

The Kansas statute which received judicial condemnation in the Haun case made it unlawful to issue scrip not to be paid in money, but was limited in its application by the proviso that "This act shall apply only to corporations or trusts or their agents, lessees or business managers that *employ ten or more persons.*" The following from that case is directly in point here, and as above shown, has been expressly approved and adopted by this court:

"We have no hesitation in saying that if this statute had, without defect as to title, clearly and in express terms amended corporate charters, retaining the section classifying corporations to which it was applicable by the number of men in their employ, it would be obnoxious to the Fourteenth Amendment to the Constitution of the United States. The law is partial and unequal in its operation. The first section of the act makes it 'unlawful for any person, firm, company, corporation or trust' to do certain things. Section 2 declares that 'all contracts to pay or accept wages in any other than lawful money, or by check or draft, as specified in Section 1 of this act, and any private agreement or secret understanding that wages shall be or may be paid, in

other than lawful money or by such check or draft shall be void.' So far the act is general and applies to all persons and aggregations of persons alike. In Section 3 partiality commences. Any person says that section, who 'shall compel or in any manner attempt to compel or coerce any employee of any corporation or trust to purchase goods, or supplies, from any particular * * * store or person shall be guilty of a misdemeanor. If, therefore, any person compels or attempts to compel or coerce any employee other than an employee of a corporation or a trust, he is guiltless of wrong and may proceed with his compulsion without fear of prosecution. Section 4 provides that the act 'shall apply only to corporations or trusts or other agents, lessees, or business managers, that employ ten or more persons.' Not only is the attempted act of compulsion or coercion denounced in Section 3 made applicable only to corporations and trusts, but the denunciation of Section 4 does not touch a corporation or trust that employs less than ten men. Thus an act of an agent or a corporation or trust of a given class is unlawful, while the same act of the same man is lawful if he works for an individual or another class of corporations or trusts. Again, the same act of the same man would be unlawful today if his employer was a corporation or trust and employed ten men, while tomorrow it would be lawful, provided in the meantime the corporation or trust had discharged one of its employees. *Shaver vs. Pennsylvania Co.* (C. C.), 71 Fed., 931. The obvious intent of the act is to protect the laborer, and not to benefit the corporation. Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such a law is beneficial to wage earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them, when they saw eleven men paid in money for the same serv-

ice performed for another corporation engaged in a like business. Such inequality destroys the law. In the instance cited two of the eleven men might quit the employment of the company for which they worked, and by this act alone make a method of payment by the corporation lawful which was unlawful while the eleven were employed. The criminality or innocence of an act done ought not to depend on the happening of such a circumstance. Equal protection of the laws means equal exemptions with others of the same class from all charges and burdens of every kind."

The language of that learned court just quoted is equally applicable to the classification made by the act of Arkansas.

In this connection it is well to mention the case of *Consolidated Coal Co. vs. Illinois,* 185 U. S., 203, upon which the State put much reliance at the hearing before the Supreme Court of Arkansas. That case involved the mine inspection law of the State of Illinois which exempted, from the requirement of inspection, mines where not more than five men were employed This classification was upheld by this court in the following language:

"The regulation of mines and miners, their hours of labor, and the precautions that shall be taken to insure their safety, health and comfort, are so obviously within the police power of the several States that no citation of authorities is necessary to vindicate the general principle. * * * In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspec-

tion provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases."

This case has been referred to in this particular connection in order to bring it into juxtaposition with the Haun case as approved by the Cotting case. These two cases taken together show that this court considers the number of men employed as a proper basis of classification in the matter of inspection of mines and as an improper basis in the matter of issuing scrip not payable in money in payment of wages. Is this court inconsistent in its rulings, and if not, why? Manifestly both decisions are sound, because in the one case the basis of classification has reasonable relation to the purposes of the enactment, whereas in the other case it has not

A very similar question was decided by the Supreme Court of Missouri in *State ex rel vs. Ashbrook*, 154 Mo., 375, in passing upon the validity of what is known as the Department Store Act of that State. The act was limited in its application by the provision that it should not apply "to any establishment where not more than fifteen persons are employed." As pointed out in another connection, the essence of provisions of this sort is to make classification on the basis of the amount of business done as in the Cotting case. Such classification

was condemned by the Missouri Supreme Court in these words:

"No suggestion is made by counsel in their effort to sustain this act, and, to our mind, none can be conjectured, why the selling of any or all of the articles of merchandise embraced in two or more of the classes or groups designated therein in one store or building, under one head or unit of management, when fifteen or more persons are employed, is a thing of danger to the public, or that the morals, health, safety or comfort of the community will to any extent be injured or prejudiced thereby in any manner different or greater than would result if the same articles were sold in different store buildings, run by the same person, corporation or company as independent establishments, and each employing fifteen or more persons, or when all of the enumerated articles are sold in one store wherein less than fifteen persons are employed. If the selling of the different articles enumerated in any one of the classes or groups designated by the act is innocent and harmless when pursued separately as a business, how does it become harmful and dangerous merely because the articles in two or more classes or groups designated in the act become united for sale under one unit of management, and the business conducted in one building, where fifteen or more persons are employed, so that it would call for special legislation with increased and onerous license fees or tax burdens imposed. Such grouping together for sale or disposition of those articles of daily use and necessity does not endanger or threaten the peace and good order of society. They neither engender disease, spread contagion, corrupt the morals, nor encourage dissipation or vice in any form because of such combination, and no sanction for such reasons can be found for the act as a public measure. * * *

"While the legislature, under its vested authority and power, may arbitrarily impose taxes, restraints and

burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the Constitution, or that will entitle it to the designation of 'the law of the land,' or that will make the act 'due process of law' by which alone the liberty of the citizen may be restrained, or his property burdened or disposed of. As said above, no reason has been given or suggested, and, to our minds, none can be conceived, why the arbitrary selection of persons and corporations having or exposing for sale, in the same store or building, under a unit of management or superintendency, at retail, in the cities of the state having a population of 50,000 inhabitants, any articles of goods, wares, or merchandise set out and named in Paragraph 1 of the act in question of more than one of the several classifications or groups therein designated, when fifteen or more persons are employed, was named or made, for the imposition of the license fee provided in the act, from which all other persons and merchants of the State are exempted. Such classification is wholly without reason or necessity. It is so arbitrary and unreasonable as to defy suggestion to the contrary. The simple statement of its creation is a most fatal blow to its continued existence. It is truly 'classification run wild.' It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or to those employed clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification, for the purpose in view, as the classification made by this act."

At the hearing before the Supreme Court of Arkan-

sas, great reliance was placed by the State on the case of *State vs. Peel Splint Coal Company*, 36 W. Va., 802, where that court considered a statute of that State somewhat similar to the Arkansas statute, under which plaintiff in error was convicted and where the classification based on the number of men employed was the same. But the West Virginia case is no authority whatever for the contention of the State. Indeed, it is not even an authority in the State of West Virginia. The case came before the Supreme Court of Appeals of that State by appeal from a conviction of the defendant for a violation of the statute and the judgment of the lower court, as is stated (p. 858), was simply "Affirmed by a Divided Court." The constitution of West Virginia (Article VIII) contains the following provisions:

"The Supreme Court of Appeals shall consist of four judges. (Sec. 2.) No decision rendered by the Supreme Court of Appeals shall be considered as binding authority upon any of the inferior courts of this State, except in the particular case decided, unless such decision is concurred in by at least three judges of said court." **(Sec. 4.)**

Now, all four of the learned judges delivered separate opinions in that case. Two were in favor of upholding the law, while the other two denounced the law as unconstitutional, both as an unlawful invasion of the right of contract and on the ground as arbitrary and unreasonable classification, and also on the ground that the law was not a proper exercise of the police power of the State. Under the provisions of the West Virginia

constitution, above quoted, the judgment of the lower court, right or wrong, had to be affirmed, because of the equal division of the court as to the law on the questions involved, but is of no binding authority, under its constitution, even in that State. The case may, therefore be as appropriately cited in favor of one side of the contentions made here as of the other. It has no value except for the weight of the argument and cogency of the respective reasons given in the several opinions delivered. We regard the argument and reasoning contained in the opinions of English and Brannon, J. J., as unanswerable, harmonizing as they do with the long list of authorities already cited in this brief. As those opinions discuss and cover every question presented by this record, we take the liberty of quoting from them somewhat at length, as follows:

"English, J. After a careful consideration of the arguments which were submitted in these cases when they were originally heard, and which have been presented upon the reargument of the same, and a thorough examination of the authorities cited both by the representatives of the State and the plaintiff in error, I have reached the conclusion that the validity of the acts under which the indictments were found cannot be sustained, for the reason that one is in restraint of trade and the other in contravention, not only of section 10 of article 3 of the bill of rights of this State, but also of section 1 of the Fourteenth Amendment of the constitution of the United States. The judgments which were under consideration by this court, and upon which an opinion was handed down at a former term, were upon indictments Nos. 4 and 5, the former of which was found under section 1, c. 76, acts 1891,

familiarly known as the 'Scrip Law,' and the latter under sections 3, c. 82, acts 1891, 'providing for weighing and measuring coal at the place where mined, before the same is screened,' which section provides that 'all coal so mined and paid for by weight shall be weighed in the car in which it is removed from the mine before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on by such owner or operator and the miners who mined the same; and coal mined and paid for by measure shall be paid for according to the number of bushels marked upon each car in which it is removed from the mine, and before it is screened, and the price paid for each bushel so ascertained shall be such as may be agreed on as aforesaid.' Section 1 of the same chapter, providing that 'it shall be the duty of every corporation, company or person engaged in the business of mining and selling coal, by weight or measure, to procure and constantly keep on hand, at the proper place, the necessary scales and measures, and whatever else may be necessary to correctly weigh and measure the coal as mined by such corporation, company, or person.'

"Now, it will be perceived that his requirement does not apply to corporations alone, but the language is: 'It shall be the duty of every corporation, company, or person engaged in the business of mining and selling coal,' etc. Let the mine owner be an individual, a firm, or a corporation when the mining operation is commenced. The act is imperative that 'the coal shall be weighed in the car in which it is removed from the mine before it is screened, and shall be paid for according to the weight so ascertained,' and the learned counsel for the state in their brief filed upon the rehearing assert 'that whatever rules and regulations can be passed and made by the legislature in the exercise of its power in relation to the business of a corporation can also be exercised in relation to the same business when carried on by natural persons, and that it would be strange, indeed, if it were not so.' And again they say: 'This and numerous

other cases that might be cited settle the matter beyond controversy that there is no distinction between the rights of private persons and corporations, so far as they relate to the screening of coal, as required by the act in question, and that if the act is a legitimate exercise of the police power of the state as to the one it is the same as to both.' This I regard as a proper concession and a fair statement as to the effect of the act under consideration. It was evidently the intention of the legislature to place all persons operating mines upon the same footing. The act is not severable; it was not intended to discriminate between corporations and individuals; and such discrimination would not have been allowed by the constitution, if such had been the intention. It being then conceded that individuals and corporations engaged in mining coal occupy precisely the same relation to the screening act above quoted, it follows that the police power confers no more right or power upon the legislature to interfere with the private contracts of such a corporation than it does to interfere with like contracts of an individual. In the ninth clause of section 17, c. 14, Code, it is provided that the word 'person' includes corporations, if not restricted by the context, and it has been held by Supreme Court of the United States that they are persons, within the fourteenth amendment. See *Railroad Co. vs. Beckwith*, 129 U. S., 26, 9 Sup. Ct. Rep., 207; *Santa Clara Co. vs. Southern Pac. R. Co.*, 118 U. S., 394, 6 Sup. Ct. Rep., 1132; *Pembina etc., Co. vs. Pennsylvania*, 125 U. S., 181, 8 Sup. Ct. Rep., 737. If, then, a corporation chartered for the purpose of mining and shipping coal, as the plaintiff in error was, occupies the same attitude that an individual does who is engaged in the same business, the question presented for our consideration is, what authority has the legislature, under police or any other power, to interfere with or control the private contracts of such corporation made with its employes for the production of merchantable coal from its mines? We surely would search in vain for any

precedent sanctioning such an unwarranted interference with private contracts. In the words of Sir George Jessel: 'If there is one thing more than any other that public policy requires, it is that men of full age and competent understanding shall have the utmost liberty to contract, and that their contract, when entered into freely and voluntarily, shall be held sacred, and shall be enforced in courts of justice.' * * * Can this statute be reconciled with section 10 of article 3 of the bill of rights of this state, which provides that 'no person shall be deprived of life, liberty, or property without due process of law and the judgment of his peers,' or with the first section of the fourteenth amendment to the constitution of the United States, which provides the same thing, in substance? In considering this question we must not lose sight of the fact that the coal, as it lies untouched in the mine, is the property of the operator, whether such operator be a single individual, or several who have combined their capital for the purpose of purchasing and operating the same as a corporation. When the mine is opened for practical operation, as a matter of course the object of the operator, whether individual or corporate, is to obtain as much merchantable coal as possible from each foot of coal as it is mined. It is a matter of history connected with the mining of coal that in digging coal a considerable percentage of slack is necessarily produced, and that the most skillful miner produces the least slack, and this is something the court may take judicial cognizance of; and, as every bushel of coal that is brought from the mine in an unsalable condition in the shape of slack results in a sacrifice of just so much of the operator's coal property, the operators of coal mines found it necessary years ago to adopt the use of the screen, not only to separate the worthless slack from the clean, merchantable coal, but they also found it necessary to weigh the coal after it was screened, as the true test of the value of each individual miner's services; otherwise, if the coal was weighed before it was screened as it came

from the mine the miner who sent out the bank car laden with the largest percentage of slack would receive the greater remuneration, because the slack would lie more compactly and weigh more than lump coal. Can the screen, under these circumstances be regarded as a fraud which calls for the interposition of the police power of the state? Is it not rather the proper method of giving to the skilled miner what he is entitled to by reason of years of experience, instead of placing him on a par with the beginner, or really below the beginner, who is able to produce a small percentage of merchantable coal, and sends out the residue in the shape of slack. Ordinarily, where an employer contracts with his employe for the performance of his work in a certain manner, the production of an article of a certain quality—for instance, the quarrying of stone and dressing it to certain dimensions, or the mining of coal in lumps of sufficient size to pass over a screen, and pass as merchantable coal—he has a right to have the work performed in accordance with the contract and not, to use a common expression, 'purchase a pig in a poke,' and pay the contract price, without getting or without having the opportunity of applying the test, and ascertaining that he is receiving what he contracted for. It is true the operator may, without violating the act under consideration, pass the coal over the screen after it is weighed and paid for; but that only results in disclosing the large percentage of slack and small proportion of merchantable coal he has weighed and paid for, and the only redress he can obtain is in a reduction of wages, which will cause dissatisfaction among the miners, and will not restore to him the coal which has been destroyed by unskillful mining. It is also true that the miner cannot either expect or reasonably demand as much per bushel for coal which is weighed before it is screened as he has heretofore received for screened coal. What, then, are the inevitable results of the law under consideration? It depresses the wages of the miner; it takes bread from the family of the skilled miner, and

gives it to the family of the careless and unskilled one; and it causes the product of the mine to be received in such a condition that a large percentage thereof is worthless to him, and to that extent the coal property for which he has paid his money is taken from him without compensation. When this act is enforced, there is no longer any incentive to the skillful miner to send out, as the product of his labor, the highest percentage of merchantable coal; and in consequence the product of the mine in the shape of merchantable coal is small, while the waste in the substance of the mine is great.

"The opinion which has been handed down in these cases places the constitutional validity of the acts under which said indictments were found upon the general police powers of the state, and with this position I cannot concur, for the following reasons: First, it must be conceded that an individual or a corporation becoming the owner of coal lands, and engaged in mining and disposing of coal, cannot be regarded in any other light than as being engaged in a private enterprise. * * * The question as to whether the legislature has a legal right to provide how and when coal shall be weighed appears from the authorities to turn upon and be controlled by the question as to whether the business is affected with a public interest. * * *

"In this state, in the case of *Salt Co. vs. Brown*, it was held that the mining of coal was not of such public utility as to entitle the company to exercise the right of eminent domain; and in the case of *Railroad Co. vs. Benwood Iron Works, supra*, it was held that a private corporation engaged in the manufacture of steel was not of such public utility as to enable it to condemn land for a switch leading to the Pan Handle Railroad, for the purpose of transporting the product of the mill. If such corporations, then, are not affected with sufficient public interest to enable them to exercise this right, should they not be regarded as private corporations, and not subject to police control, further than the health and

safety of the operators are concerned, and further than an individual engaged in the same business would or could be controlled? In the case of *Sawyer vs. Davis*, 136 Mass., 239, the supreme judicial court of Massachusetts said that 'nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced;' and just here I may ask, with propriety, how will the community in any manner be affected, whether the coal of this company is weighed before or after it is screened, and how will the public in general be affected thereby? In the case of *Ward vs. Farwell*, 97 Ill., 608, the court in its opinion says: 'Private corporations created for business purposes are artificial beings, clothed with certain rights and privileges, and are permitted to own and acquire property for certain purposes and to a limited extent; and when so created they are subject to the same legislative control that natural persons are under like circumstances. With certain constitutional limitations, the rights of all persons, whether natural or artificial, are subject to such legislative control as the legislature may deem necessary for the general welfare and it is a fundamental error to suppose there is any difference in this respect between the rights of natural and artificial persons. They both stand precisely on the same footing.' * * * And at this point the question suggests itself, what more complete confiscation of the operator's property could possibly be enforced than to have a large percentage of his coal mined and put out in a condition that would be utterly worthless to him, and in addition to that to be compelled to pay the miner for his labor in producing it in that condition? To uphold, as constitutional, legislation which interferes with the private contract of the operator with the miner, and prescribes that

coal shall be weighed and paid for before it is screened or any opportunity is afforded to determine its quality and value, would appear to me to be on a par with legislation which would compel the owner of a stone or marble quarry, who had contracted with his employees to pay them for dressed stone of certain dimensions, to measure the blocks in the rough, as they came from the quarry, and pay, not only for the dressed stone, but for the spalls and waste that accrued in squaring the same in accordance with the contract, and would characterize as constitutional an act which would provide that the landowner who employs a saw mill man to go among his timber, and according to the common expression take it from the stump, and convert it into merchantable boards and lumber, to measure and pay for the same as it came from the saw, including in the measurement, slabs, culls, sawdust and particles torn away by the action of the saw, and would sanction a law which would compel a diamond to be paid for in the rough before its qualities had been tested and developed by submitting it to the skillful hands of the lapidary. I fail to perceive in what manner the public is interested in the private contract made between the coal operator and his employes, as to the time when such employe shall have the product of his labor weighed and paid for. The labor of the employe is his own property, and he has a perfect right to fix a price upon it, let it be high or low, and the public has no right to say, 'Why do you so?' Neither is the public welfare in any manner affected by the terms of the contract, any more than it is in that of the man who works by the day on the farm.

"The seventh section of the act providing for weighing coal before it is screened excludes from its operation any corporation, company, or person owning or operating a coal mine in which less than 10 miners are employed, which results in this: that an operator only employing nine need not weigh the coal before it is screened, but one employing 12 must. Can anyone say

why the operator should be allowed to weigh the coal after it is screened for the nine, and that he must weigh it previously for the 12? Is not the danger of fraud as great to the individual miner in the one instance as the other? And is not one miner as much entitled to the benefit of the law (if it be beneficial) as another? And again, is there any good reason why the small operator should be allowed to obtain from his mine merchantable coal by using the screen before it is weighed, and the large operator be denied the privilege of thus testing the services of his employes, and obtaining merchantable coal for the wages he pays them? And why is it that the police power of the state should be invoked for the protection of the 12, while the nine are left to work their way with fear and trembling, and protect themselves from the alleged iniquities of the screen?

"The case of *Godcharles vs. Wigeman*, 113 Pa. St. 431, 6 Atl. Rep., 354, holds that 'the first four sections of the "Store Order Act" of June 29, 1881, which attempts to prevent persons who are *sui juris* from making their own contracts, are unconstitutional and void,' and the court in its opinion says: 'The act is an infringement alike of the right of the employer and the employe; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.' So, also, in *Re Jacobs*, 98 N. Y., 98, it is held that 'while, generally, it is for the legislature to determine what laws are required to secure and protect public health, comfort, and safety, under the guise of police regulations, it may not arbitrarily infringe upon personal or property rights, and its determination as to what is a proper exercise of the power is not final or

conclusive, but is subject to the scrutiny of the courts.' In the case of *Watertown vs. Mayo,* 109 Mass., 315, 319, Colt, J., says: 'The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance, and, when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen.' In the Slaughterhouse Cases, 16 Wall., 36, 87, Field, J., says: 'All sorts of restrictions and burdens are imposed under the police power, and, when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal, but, under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment.' Again, in the case of *People vs. Gillson,* 109 N. Y., 389, 17 N. E. Rep., 343, the court held that 'while it is for the legislature generally to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and the exercise of its discretion in this respect is not the subject of judicial review, yet a statute, to be upheld as an exercise of the police power, must have some relation to these ends. The rights of property may not be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object of the regulation;' and in this immediate connection I may ask how or in what manner could the public health, comfort, or safety be in any manner concerned in the enforcement of a statute which provides that coal, as it comes from the mine, shall be weighed in the car in which it is removed from the mine before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on by such owner or operator and the miner who mined the same? Instead of promoting the public safety and welfare, does not this act rather have

a tendency to promote dissatisfaction and discord between the operator and miners who were prosecuting their work under their contract to receive pay for mining the coal which was weighed after it was screened? In the state of Illinois an act was passed requiring the operator of mines to cause to be furnished and placed upon the railroad track adjacent to the coal mine a track scale of standard measure, upon which to weigh the coal hoisted from the mine, and at the time the act took effect, and for a long time prior thereto, the corporation owning the coal mine had a contract with all men employed to mine coal in that mine to receive, as the wages for their labor, 40 cents per box for the coal mined therefrom, and said miners were satisfied to work under said contract. Upon an indictment for failing to provide such track scales and weigh the coal as in said act provided, the supreme court of Illinois, in the case of *Millett vs. People*, 117 Ill., 295, 7 N. E. Rep., 631, held, (section 5 of syllabus:) 'It is not competent for the legislature, under the constitution, to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power.' And the same thing was held by this court in the case of *State vs. Goodwill*, 33 W. Va., 179, 10 S. E. Rep., 285, and in the case of *Frorer vs. People*, 31 N. E. Rep., 395, (decided by the supreme court of Illinois, March 26, 1892,) which was an action of debt under the act approved May 28, 1891, entitled 'An act to provide for the payment of wages in lawful money, and to prohibit the truck system, and to prevent deduction from wages, except for lawful money actually advanced.'

"The court in its opinion quotes with approval the case of *Com. vs. Perry*, from the supreme court of

Massachusetts, reported in 28 N. E. Rep., 1126, saying: 'The defendant was indicted under a statute in Massachusetts providing that no employer shall impose a fine upon, or withhold wages or any part of the wages of, an employe at weaving for imperfections that may arise during the process of weaving,' and the court held the statute unconstitutional, and in doing so said: 'There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. The right to acquire, possess, and protect property includes the right to make reasonable contracts which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason—indeed, the statute before us recognizes it—why men should not be permitted to engage in it as a legitimate business into which anybody may freely enter. The right to employ weavers and to make proper contracts with them, is therefore protected by our constitution; and a statute which forbids the making of such contracts, or attempts to nullify them or impair the obligation of them, violates fundamental principles of right, which are expressly recognized by our constitution;' and why, I ask, may not all this be said with equal propriety with reference to contracts made between employer and employe engaged in the coal industry in our own state? The court further on in its opinion, in the case of *Frorer vs. People, supra*, says: 'But it is contended the enactment before us is sustained by the principles announced in *Munn vs. People*, 69 Ill., 80. There is, in our opinion, no analogy between that case and the present. In the first place, there the subject-matter of the act was local and exceptional in its nature, and the law in question operated alike upon all affected by like conditions. In the second place, the business of warehousing was held to be affected by a public use, and assimilated to the business of

carriers, innkeepers, millers, and others of like kind, and therefore subject to regulations for the public welfare.' 'And in the third place, the statute there affected only the business of warehousing—that wherein the necessity of transportation from west to east left the shipper no discretion, but compelled him, whether he would or not, to patronize the warehouse. It did not assume to regulate or restrict the warehouseman in contracting with his laborers, or his laborers in contracting with him.' And again, the court says: 'But the police power is limited to enactments having reference to the comfort, the safety, or the welfare of society, and under guise of it a person cannot be deprived of a constitutional right;' citing *Millett vs. People, supra* 'It would seem quite clear that the enactment before us (speaking of the truckstore bill) has no reference to the comfort, the safety, or the welfare of society, for it applies as well to a case where a poor man in want of tools, clothing and food, without money and without credit, but able and desirous to labor to obtain tools, clothing and food, applies to the operator of a mine or manufactory who is able to, and but for the prohibition of this law willing to, exchange them on fair terms for the labor of him who needs them, as to cases where there is the strongest probability that the employer will in such exchange, overreach and defraud the employe. * * * The act does not attempt to prevent extortion and fraud by the operator of the mine or manufactory otherwise than by the heroic treatment of withdrawing the power to contract. It proceeds upon the principle that because liberty may be abused, the liberty itself should be withdrawn—a principle by the extension of which all liberty in the acquisition of property may be withdrawn from every citizen.' "

"Brannon, J. When, at a former term, I concurred in the decision then made of these two cases, I had very grave doubt; but I resolved that doubt in favor of the validity of the act. Reargument and a patient reconsideration have intensified that doubt into a decided

opinion that the 'Screening Act and the 'Scrip Act' are both unconstitutional. I cherish the highest respect for the legislature, and, if these acts were meant for and would benefit miners, I will say that no one will go further and more freely than I in the defense of their interests and rights; but I must do so in harmony with the constitution, that impartial arbiter of the rights of all men in free republican government. It is the highest and most sacred of all the functions of the judiciary to uphold the constitution without fear, favor or affection. Federal and state constitutions together declare 'that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, and of pursuing and obtaining happiness and safety.' 'No person shall be deprived of life, liberty, or property without due process of law.' 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' nor 'abridge the privileges or immunities of citizens of the United States.' The word 'Liberty,' as here used, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, and to make lawful contracts therein, to the ends of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness. The right to contract and be contracted with is indispensable to these indispensable objects. Elsewhere this great right is recognized in the constitutions by the provision that contracts made in its exercise shall not be impaired. It is a privilege essential to earn bread and secure happiness. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed, under all civilized governments, than this right of contract. A man must have the right to exercise his skill and talents, and dispose of and use his labor and property, in lawful pursuits as to him shall seem

proper. The property right may be violated by prohibiting its full use to the owner, as effectually as by taking it from him, his ownership being thus damaged I shall not elaborate my views, as other judges fully discuss the subject. My conclusions are that both acts invade the essential rights of business, contract, and property as against both employer and employe, forbidding contracts and the use of property, and the disposal of skill and labor, which, but for the acts would be perfectly lawful, and that the acts are not within the police power. The 'Screening Act' discriminates against the business of coal mining only, and is class legislation. Farming and brick making, for instance, are private occupations, which, no matter what their magnitude, are not so in touch with the public interest as to place them under the police power and legislative control. Neither is coal mining. If, upon the suggestion of a supposed or real evil, always incident to the transaction of all business, the legislature can restrict lawful contracts in private business, government becomes, not simply paternal, but oppressive and tyrannical. The 'Scrip Act' would prevent the farmer, brickmaker or coal operator from giving to his hands for wages an order to anyone for sugar, coffee, flour or meat—a great reversal in the right of contract as used time out of mind. This act was not meant to prevent the vitiation of the circulating currency of the country, and cannot be supported on that theory.

"I concurred in the decisions in *State vs. Coke Co.*, 33 W. Va., 188, 10 S. E. Rep., 288; *State vs. Goodwill*, 33 W. Va., 179, 10 S. E. Rep., 285; *State vs. Gilman*, 33 W. Va., 146, 10 S. E. Rep., 283. A review of those cases brings me to the same opinion, and I do not see how we can sustain these statutes without abandonment of their soul and spirit. Those cases, with other authorities, upon this rehearing have conducted me to the opinion just indicated. *Godcharles vs. Wigeman* 113

Pa. St., 431, 6 Atl. Rep., 354; *Frorer vs. People,* (Ill., Sup., filed March, 1892,) 31 N. E. Rep., 395; *Com. vs. Perry,* (Mass., filed Dec. 1891,) 28 N. E. Rep., 1126; *In re Jacobs,* 98 N. Y., 98; *People vs. Gillson,* 109 N. Y., 389, 17 N. E. Rep., 343; *Millett vs. People,* 117 Ill., 294, 7 N. E. Rep., 631; *Ex parte Kubach,* 85 Cal., 274, 24 Pac. Rep., 737; *Cooley, Const. Lim.* (5th Ed.) 737, 739. The adverse opinions in *Munn vs. Illinois,* 94 U. S., 113, and *Budd vs. New York,* 143 U. S., 517, 12 Sup. Ct. Rep., 468, are able and exhaustive of the subject I do not think the decisions in those cases govern these, because there the statutes could more readily be ranked under the police power, since they regulated between the operators of grain elevators and the general and unlimited public, fixing charges for the benefit of the public; whereas, these acts are not made for the public at large, but simply prohibit certain contracts between employers and employes."

V.

THE QUESTION OF FRAUD.

But it is argued that this act may be sustained as an exercise of power to regulate weights and measures and protect the miner from fraud although there is nothing in either the title or the body of the Act to indicate any such purpose. No one would question the power of the state, where coal mined was to be paid for by the quantity, whether of screened or unscreened coal as the particular contract might provide to require the same to be accounted for at the legal rate of weights as fixed by the laws of Arkansas. Such a law would not differ in principle from laws prohibiting false weights in the sale or disposition of other commodities Such a law might

be said to be a protection against fraud. But such is not the nature of the Act in question. It does not require that where coal mined is to be paid for by contract on the basis of the quantity of screened coal produced, such screened coal shall be accounted for at the legal rate of weights as fixed by the laws of Arkansas. On the contrary it prohibits, by making void and of no effect, any contract whatever to pay for coal mined on the basis of the quantity of screened coal produced, no matter how strictly fair and honest the weights may be and even goes so far as to provide that where a contract of that nature is made, the miner shall nevertheless and notwithstanding the contract, be paid the same price per ton for his unscreened coal as he had contracted to accept per ton for the screened coal which he produced. In other words, the act makes no attempt to prevent fraud in the performance of an honest contract by requiring honest weights, but prohibits and nullifies the making of one particular kind of contract however advantageous and desirable the same may be for the parties to the contract.

Is there anything inherently dishonest in a contract for mining on the basis of screened coal? Is such a contract itself a fraudulent design or device? Is it used as a fraudulent inducement? Is the subject matter of such a contract fraudulent? Is it immoral? Does it threaten the health or safety of the miners or of the public? Does it stand in any light or in any respect on a different footing as to the right to enter into a contract

than does a contract for mining on the basis of unscreened coal? Will the State contend that it is fraudulent to enter into a contract for mining on the basis of screened coal? Or that the making of such a contract is or may be made a fraud if the contract is faithfully complied with? If so, what is it? If the miner gets what he contracts for, what is there that is fraudulent or wrong about it? If he does not get what he contracts for, that is not because the contract itself is fraudulent, but because the contract is violated, and this must happen after it is entered into; and what is there in violating such a contract that differs in turpitude from violating any other contract? Suppose false weights are used in mining unscreened coal, would that make such a contract itself dishonest or immoral so as to give the legislature the power to prohibit such contracts altogether? Suppose all contracts for mining at quantity rates were prohibited, and the miners were hired by the day, week or month, and that the employer then violated such contracts, would that authorize the legislature to prohibit contracts of that kind? If not, why not? If in one case, why not in all? Is not the question as to each one, "does the miner get what he contracts for?" If he does, how can such a contract be suppressed on the ground of fraud? If he does not it must be owing to the fact that the terms of the contract are violated, not that the contract is fraudulent, but that its terms are not complied with, and we have the State contending for the paradoxical proposition that a contract, honest

when made, becomes fraudulent afterwards, not because it is complied with but because it is violated; not because it is *per se* a fraud or can be made an instrument of fraud by complying with it, but that the fraud, if any, consists in violating it. Is it not clear that to sustain this law on any such ground would be in effect to decide that the legislature has the absolute power to prohibit any or all contracts, and that the right to contract would thus become a matter of mere legislative grace? For what line of contracts can be named that in some instances have not been violated; and what law prohibiting any contracts that the legislature, through any whim might see fit to prohibit, could not be sustained by the same reasoning as that which is advanced on this phase of this case to sustain this law? No one will contend, no one would be believed if he would contend, that a contract for mining on the basis of screened coal is *per se* dishonest. No man will contend that it is *per se* a fraudulent device, or that it is fraudulent inducement, or that it may be made such. There is nothing in the contract which is claimed to be dishonest or fraudulent, but all that can be said about fraud or dishonesty is that the contract is violated after it is entered into—that its terms are not complied with. May not the same be asserted truthfully of all contracts? And if the fact that contracts are violated after they are made gives the legislature power to prohibit such contracts, that is simply arguing that the legislature possesses absolute power to suppress or prohibit all contracts, and that the right to

make any contract is a matter of legislative will, and that such a right is a mere gift bestowed by the state.

Fraud involves the elements of wrong *per se*. Of course, the perpetration of fraud is a proper subject for penal legislation, and when the contract itself, or its subject matter, is "the heart of the fraud"—is the fraud itself—the making of such a contract may be prohibited and made penal. In such a case it is the execution of the contract and a compliance with its terms, not its violation, that constitutes the fraud.

When the contract is not fraudulent *per se*, when it is honestly made, and when compliance with its terms is not a fraud, but the fraud, if any, is in violating the contract, it is strange reasoning to say that the legislature has power to strangle the innocent contract instead of its violator.

It is a strange mental aberration to argue that the legislature has power to prohibit contracts, to invade the right of a class of employers or employes, and deny to them their right to enter into a contract at all; not because the contract is a fraud, or is *malum in se*, not on the ground that the fraud consists in complying with the contract, in carrying out its terms, but for the reason that some one asserts that the contract is not complied with, that by some its terms are fraudulently violated, that the fraud is committed in violation of the contract, when there would be no fraud if the contract was faithfully performed.

This is an absurd foundation on which to rest a

conclusion that the legislature, under its power to suppress fraud, has the right to prohibit contracts which are not fraudulent themselves, or which cannot become fraudulent or be made the instruments of fraud by complying with their terms, but on the ground that the contract induces the fraud because it exists so that some one may violate it.

Several other propositions might be as effectively supported by the same process of reasoning, as for instance:

Property is the cause of larceny by existing to be stolen; and,

Dwelling houses are the parents of arson, because if there were none they could not be burned.

And it is easy to reason out authority in the legislature on this line, and to justify an act denying the right of property altogether, on the ground that the right of property is the cause of all crimes that are or may be committed against it. On that ground life is the cause of murder and should be prohibited. This is the philosophy of negation, of destruction and annihilation.

But it is not conceded that contracts, such as existed between the coal company and its employes, are violated more frequently than any other contracts in any other line of business, nor can the State seriously make such a monstrous and unfounded claim. The operator can have no interest in mining on the basis of screened coal which conflicts with the interest of the miner, for it is to the interest of both to get out as much screened coal

as possible. The operator might haggle over the price per ton, he might try to hire his miners at as low a rate as possible, as he has a right to do; but when the contract is made, it is to the interest of both to produce as large a percentage as possible of screened coal. There is no necessity here to deny the right of the legislature to fix the size of the screen or the size of its meshes, and the angle of its plane of inclination, to be taken as a part of a contract for mining screened coal where the parties themselves do not stipulate therefor. As a matter of fact, they do stipulate for the kind of screen, but at this time no reason is apparent why the legislature might not define what should constitute a standard screen, where the contract itself is silent in respect of that provision, the same as the legislature fixes the number of pounds in a bushel of coal or corn. The authority of the legislature is not questioned to provide a penalty for fraudulently changing or interfering with a screen after one has been fixed by agreement. But none of these considerations go to the prohibition of a contract because it may be violated after it is made, but are remedies and penalties to secure the enforcement of the contract that is made by the parties.

VI.

AMENDMENT OF CHARTER THEORY.

It has been suggested that this act may be sustained on the so-called amendment of charter theory and it is so intimated, although somewhat tentatively, in the

opinion of the Supreme Court of Arkansas delivered in this case. Act 219 was passed at the 1905 session of the General Assembly of the State of Arkansas, and by its terms was to take effect on the first day of April, 1906. At that time, the Bolen-Darnall Coal Company was a Missouri corporation, and, as stated in the agreed statement of facts, authorized to do business under the laws of the State of Arkansas. The corporation laws of the State of Arkansas, in force at that time, and which the Bolen-Darnall Coal Company complied with, are to be found in the Act of Arkansas of 1899 on pages 18 and 305. Said law is as follows:

"Section 1. Every corporation formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this state, or to continue business therein, if already established, shall by its certificate, under the hand of the president and seal of such company or corporation, filed in the office of the secretary of state of this state, designate an agent, who shall be a citizen of this state, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in this state. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this state.

"Any corporation so filing such certificate in the office of the secretary of state shall pay therefor a fee of one dollar ($1.00) for such filing, and a like fee for each subsequent appointment of an agent so filed.

"Section 2. Every company or corporation incorporated under the laws of any other state, territory or country, now or hereafter doing business in this state, shall file in the office of the secretary of state of this

state, a copy of its charter, or articles of incorporation, or association or in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated, and certified by the proper authority. The secretary of state shall cause all such charters, articles of incorporation, or association, so filed to be duly recorded in a book kept for that purpose. And such corporation shall be required to pay into the treasury of the state, incorporating and other fees equal to those required of similar corporations formed within and under the laws of this state. Upon compliance with the above provisions by said corporation the secretary of state shall cause to be issued to said corporation, a copy of such charter, or articles of incorporation, or certificate so filed, properly certified under the seal of his office, and a copy of such charter, or articles of incorporation or certificate, certified to by the secretary of state shall be taken by all the courts of this state as evidence that the said corporation has complied with the provisions of this Act, and is entitled to all the rights and benefits therein conferred. And such corporation shall be entitled to all the rights and privileges, and subject to all the penalties conferred and imposed by the laws of this state upon similar corporations formed and existing under the laws of this state: provided, that the provisions of this Act requiring copy of original articles of incorporation or charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad companies, which have heretofore built their lines of railroad into or through this state: provided, further that the provisions of this Act is not intended and shall not apply to 'drummers' or traveling salesmen soliciting business in this State for foreign corporations which are entirely nonresident."

Section 11, Article 12, of the constitution of Arkansas is as follows:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this state, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

When the Bolen-Darnall Coal Company complied with this law, there arose between it and the State of Arkansas a contract, the obligation of which could not be impaired by any subsequent legislation by the State.

American Smelting Co. vs. Colorado, 204 U. S., 103.

Chicago, R. I. & P. R. Co. vs. Ludwig, Secretary of State of Arkansas, 156 Fed. Rep., 152.

Seaboard Air Lane Railroad Co. vs. Railroad Commission of Alabama, 155 Fed. Rep., 792.

If the contention previously made in this brief be sound that the law in question is unconstitutional as to private individuals engaged in the business of mining, either as operator or laborer, the act would not be saved by the amendment of charter theory because it would still be in conflict with the Constitution of the United

States in the particulars hereinbefore pointed out and inasmuch as that instrument is the "supreme law of the land" would have to yield to its provisions. This theory is so far-fetched that it would seem not to justify any further elaboration.

It is unnecessary to cite the decisions of this court which hold that corporations are persons within the meaning of the Fourteenth Amendment entitled to the benefit of its protection.

VII.

CONCLUSION.

In conclusion, it may not be useless to call attention to the fact that under the agreed statement of facts in this case, it is not possible to surmise that mines in the State of Arkansas employing less than ten men underground are in an experimental state for the reason that the agreed statement of facts expressly states that at the time in question "there are *coal mines* in said State and county *operated* by both corporations and individuals in which less than ten men are employed underground by the ton and bushel rates." This agreement certainly negatives the idea that such mines were experimental and was evidently intended to bring before the court the fact that there existed numerous mines in the State at the very time which employed less than ten men who were paid on the basis of screened coal, the same as was being done by the Bolen-Darnall Coal Company.

It is respectfully submitted that the judgments of the Circuit Court of Sebastian county and of the Supreme Court of the State of Arkansas should be reversed.

DANIEL B. HOLMES,
Attorney for Plaintiff in Error."

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN McLEAN, *Plaintiff in Error,*

vs.

THE STATE OF ARKANSAS.

No. 29.

ADDENDUM TO REVISED BRIEF FOR PLAINTIFF IN ERROR.

The opinion delivered by the Supreme Court of Arkansas in this case contains the following statement:

"Similar laws have been enacted, in several of the coal producing states, and where tested have received the sanction of the highest courts of the states, as a valid exercise of police power. Sec. 8786, Dig. Mo. Stat., 1899; Chapter 82, Acts of Leg. W. Va.; *State vs. Peel Flint Coal Co.*, 36 W. Va., *supra*, Secs. 4000-5, Stat. of Kan., 1899; *Wilson vs. State*, 61 Kan., 34; Sec. 7840, Revised Stat. of Ind."

In view of the fact that this opinion was handed down only as recently as December 10, 1906, the foregoing statement for its inaccuracy and misleading character is a very remarkable one.

The Missouri statute referred to appears never to have been litigated in the courts of that state, but in the light of what is said in *State vs. Loomis*, 115 Mo., l. c., 316, and in *State vs. Julow*, 129 Mo., 163, it seems certain that the statute of that state will unhesitatingly be declared to be unconstitutional whenever the opportunity to do so is presented.

So far from the West Virginia act being upheld by the highest court of that state, I have already shown to this court that the Supreme Court of Appeals of that state was equally divided on the subject and that by express provision of the constitution of that state the decision cited in support of the statement of the Supreme Court of Arkansas is no authority whatever in the state of West Virginia.

I have also shown to the court that the Kansas case, above referred to, so far from upholding the statute, in the sense in which it is upheld by the Supreme Court of Arkansas, the Kansas statute was so construed by the Supreme Court of that state as to escape the constitutional objection, the court holding that the statute was susceptible of two constructions and that it would be invalid if construed to interfere with the right of contract as the Arkansas statute is properly construed by its Supreme Court.

The Indiana statute had been before the Supreme Court of Indiana twice, in *Martin vs. State*, 143 Ind., 545, on January 29, 1896, and in *State vs. Pasco*, 153 Ind., 214, on October 10, 1899. In each of those cases the constitutionality of the statute was raised, but the Supreme Court of that state, in accordance with the practice which there prevails, refused to pass upon the constitutionality of the statute, because, for other reasons appearing on the record of those cases, the court found a way to hold that the defendants could not be convicted and would have to be discharged. Furthermore, in the Martin case, somewhat similarly to what was done by the Supreme Court of Kansas in the Wilson case, the Supreme Court of Indiana so construed the Indiana statute that in all cases in that state it is, notwithstanding the statute, permissible and lawful to separate the slack from the coal by screening before the same has been accounted for and credited to the miner.

The statement of the Supreme Court of Arkansas seems still more remarkable when it is recalled that the Supreme Court of Illinois, in *Ramsey vs. People*, 32 N. E. Rep., 364, had decided a similar statute to be unconstitutional as early as October 31, 1892, and the Supreme Court of Colorado had advised the legislature of that state, on March 1, 1895, (*In re* House Bill No. 203, 39 Pac. Rep., 431) that a similar bill, if passed, would be unconstitutional.

What is above pointed out illustrates how ill-con-

sidered was the judgment of the Supreme Court of Arkansas in this case. It seems inconceivable that the above statement of that court would have been made if the decisions of the highest courts of the states of Missouri, West Virginia, Kansas, Indiana, Illinois and Colorado had been carefully examined or examined at all.

Respectfully submitted.

DANIEL B. HOLMES,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

JOHN McLEAN, PLAINTIFF IN ERROR,

vs. No. 243.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

On May 1st, 1905, the legislature of Arkansas passed an Act providing that it should be unlawful for any mine owner, lessee or operator of coal mines in this State, where ten or more men were employed undergronud, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which would take away any part of the value thereof, before the same had been weighed and duly credited to the employee sending the same to the surface, and to account for it at the legal rate of weights as fixed by the laws of Arkansas. The Act further provided that

any owner, lessee or operator of any such coal mine in this State, who should knowingly violate any of the provisions of this Act, should be deemed guilty of misdemeanor, and upon conviction, be fined not less than $200 nor more than $500 for each offence.

The plaintiff in error, John McLean, was the agent and general manager of the Bolen-Darnell Coal Company, a corporation organized under the laws of the State of Missouri, and doing business under the laws of the State of Arkansas, the said coal company owning a coal mine near Hartford, Sebastian county, Arkansas, which said mine employed more than ten men to work underground. It is conceded that plaintiff in error, as such agent, violated the above statute by passing the coal taken from said mine over a screen before the same was weighed or credited to its employees.

There is no dispute about the facts in this case; it is admitted that plaintiff in error violated this statute. The case must be affirmed unless the statute is unconstitutional. Plaintiff in error attacks the validity of the statute upon two grounds; claiming first, that it is an unwarranted infringement of the right of contract; second, that as the statute applies only to mines employing ten or more men underground, that it is for

that reason void on account of unlawful discrimination.

Defendant in error maintains that the law is valid and comes within the proper exercise of the police power of the State; and for the further reason, that as the Bolen-Darnell Coal Company is a foreign corporation, the law is valid as an amendment to the charter of said company.

That the State has the legal right to pass all laws necessary for the protection of the health, safety and comfort of its citizens, and to prevent fraud and imposition, can not be denied; and if necessary for such purposes, the State may abridge or limit the right of contract, or control and prohibit any business that so interferes with the rights of her citizens. But it is equally clear that the State has no right arbitrarily to interfere with the business of her citizens, or discriminate against one class in favor of another, unless necessary to insure the health, comfort or safety of the people. The rule is clear; the difficulty arises in the application. Plaintiff in error contends that the police power of the State has no application to this case; that no question of fraud, imposition, health, safety or comfort of the miners or other citizens of the State arises. He also says that the statute, by requiring coal to be

paid for by weight before being screened, curtails plaintiff in error's right to contract, abridges his liberty and denies him equal protection of the laws; and that the law discriminates against him from the fact that it only applies to mines working ten or more men.

We maintain that the law was intended to protect the miners; that it was passed to prevent fraud in determining the amount of coal mined. The operator and the miners do not stand upon an equal footing. The object of the law is to protect the miner and guarantee to him pay for all his labor. The legislature intended to prevent fraud by the operator and to see that the laborer enjoyed the full fruits of his labor. It comes clearly within the police power of the State. The decisions of the courts dealing with the many phases of the police power of the State are too numerous to cite. Each case, to some extent, must stand upon its own merit. We find in the reports some conflict and many distinctions, real or apparent. The general rule seems to be that if the apparent object of the law is to protect the public or any class of citizens, then the statute is valid, regardless of whether its provisions seem wise or otherwise to the courts. But if the apparent object of the law is to arbitrarily deny to one the right to contract, or deprive him of his property, or discriminate against one class to the

advantage of another where the public welfare does not demand same, then such law must fail.

A careful examination of the authorities cited and relied upon by plaintiff in error shows that the statutes there held void fall within the latter class.

In State vs. Ashbrook, 49 L. R. A., 265, the statute made it unlawful for stores employing more than fifteen persons to engage in certain kinds of business or to sell certain articles of merchandise. Such an Act was necessarily void, for the reason that it could be seen at a glance that it was not passed to prevent fraud or arrest a danger to the public, or to preserve health, safety, comfort or the morals of the people. The statute was enacted to prevent large department stores from selling certain classes of goods and thus competing with smaller mercantile establishments dealing in one line of goods.

So in State vs. Goodwill, 25 Am. St. R., 863, the legislature of West Virginia passed a law prohibiting corporations engaged in mining from issuing to its employees, in payment for labor, scrip or orders redeemable in merchandise. The statute did not apply to other corporations engaged in other kinds of business.

The court held that there was no reason why the law should be limited to one class of corporations,

while others employing as many or more men were not interfered with. However, this case is in direct conflict with several more recent decisions of other courts sustaining the validity of such statutes.

See Opinion of Justice, 163 *Mass.,* 589.
Hancock vs. Yaden, 121 *Ind.,* 366.

In Cotting vs. Godard, 183 U. S., 79, the legislature of Kansas passed a law fixing the prices that stock yards might charge for handling cattle and other stock, but provided that it should only apply to stock yards handling daily not less than one hundred head of cattle, three hundred hogs or three hundred sheep. Other stock yards might charge any price that they desired. As stated by the court, this was an arbitrary personal discrimination against one class in favor of another. Such discrimination was not demanded by the public welfare. The health, safety or morals of the people were in no way affected by the law. It was an effort to injure or destroy the larger concerns and benefit the smaller ones. In this case the court recognized the right to make reasonable discrimination, or classification, in the following language:

"So, again, exercising the undoubted right of classification, it may often happen that some classes are subjected to regulations and some individuals are burdened with obligations which do not rest upon other

classes or other individuals not similarily situated. * * * It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope, or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another, certain burdens imposed on one which do not rest upon another."

So in Connelly vs. Union Sewer Pipe Company, 184 U. S., 555, the Illinois anti-trust law was held invalid for the reason that it did not apply to agricultural products or live stock. As said by the court, it was just as easy to form a trust or combination with agricultural products or live stock as with other commodities. The police power of the State was not raised or discussed in the case.

In Bradley vs. People, 83 Am. St. Rep., 116, the legislature of Illinois enacted a law prohibiting lodging houses from permitting more than six persons to occupy the same room, but the law did not apply to hotels or boarding houses. The court held that there was no reason why hotels or boarding houses should be permitted to house a dozen or more persons in a single room while lodging houses could only permit six to occupy one room. This was a clear case of arbitrary and unlawful discrimination.

The next case cited by plaintiff in error is State vs. Haun, 61 Kansas, 369.

The legislature of Kansas passed a law making it a misdemeanor for any corporation or trust to issue scrip, not redeemable in money, but provided that the Act should not apply to corporations or trusts employing less than ten persons. The Act was similar to the Missouri department store statute, and was held invalid upon the same ground.

An inspection of the cases cited by plaintiff in error will show that none of them are in point. They are to the effect that the legislature may not unreasonably discriminate against one class of persons or corporations. They establish the fact that a State cannot prevent department stores from competing with smaller stores carrying a single line of goods; or that it can not be unlawful for lodging houses to place more than six persons in a room, while hotels and boarding houses are allowed to place as many as they desire in a room; and that the legislature can not fix the charges to be made by stock yards handling one hundred cattle per day, while other stock yards may charge as much as their customers will stand. Such decisions have no application to the case at bar. Here

the object is not to prevent competition, or to injure one class or benefit another class.

The sole object of this statute is to protect the miner; to see that he is honestly paid for his labor, and to prevent fraud in the measurement of coal mined. Coal screens are as different in construction as other mechanical devices. They are made by different factories, and are not uniform in size or shape; and they become worn and defective from use—the bars spring apart, the openings become larger. The amount and kind of coal that will pass through a screen also depends upon its slope or pitch. Much more slack and small lump will pass through a screen that is almost level than one with the proper pitch. There are many opportunities for fraud or mistake where coal is screened. No two screens will give the same result, and the same screen when differently elevated will give different results. Scales are uniform and accurate. The law gives the miners the right to have a check weighman to see that the coal is correctly weighed and the scales accurate. It is the only true manner to determine the amount of coal mined, and the only correct test of the amount earned by the laborer.

Legislation for the prevention of fraud in weights and measures dates from the earliest period of English history.

Freund, in his recent work on "Police Power," says:

"The private and criminal law as well as the police power undertake to afford protection against fraud. * * *

"The earliest legislation for the prevention of fraud relates to weights and measures. It goes back to Anglo-Saxon times, and forms a part of Magna Charta. The constitution of the United States provides for uniformity of weights and measures by giving Congress power to fix their standard. * * *

"Statutes not infrequently prescribe that certain common forms of packages shall contain a fixed amount by weight and measure, and also that the enclosure itself shall not contain more than a prescribed weight; as that no baled hay shall be offered for sale with more than ten per cent. of the weight thereof in wood to the bale, or that the weight of the package be stamped thereon. Such provisions are justified by the danger of fraud in the absence of uniformity.

"Similar in character are the laws which require the weighing or measuring of articles by public authority. * * *

"In a number of cases statutes prescribe that certain commodities shall be sold by a given weight or measure or in a certain package, and not otherwise; as that bread shall be sold in loaves of two pounds, or in half, three-quarter or quarter loaves, and that coal, when sold in quantities of five hundred pounds or more, except by the cargo, shall be sold by weight; that

milk shall be sold in wine measures; or that in all contracts for the sale and delivery of oats and meal, the same shall be bargained and sold by the bushel. Such laws have been sustained without much questioning."

Sections 272 *to* 275.

The Arkansas screen law is substantially the same, we might say almost identical with the statutes of several other States.

The same law has been enforced for many years in Missouri, Kansas, Indiana, West Virginia and in several other States. See

Sec. 8786, *Dig. Mo. Stat.*, 1899.
Chap. 82, *Acts of Legislature W. Va.*, 1891.
Secs. 4000-5 *Gen. Stat. of Kansas*, 1899.
Sec. 7840, *Revised Stat. of Ind.*, 1897.

In State vs. Peel-Splint Coal Company, 36 W. Va., 802, the Supreme Court of West Virginia construed the law of that State, the third section of which is as follows:

"All coal so mined and paid for by weight shall be weighed in the car in which it is removed from the mine before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on by such owner or operator and the miners who mined the same."

The seventh section provided that "this Act shall not apply to any corporation, company or person own-

ing or operating a coal mine in which less than ten miners are employed."

In passing upon the validity of this statute the court said:

"The plaintiff in error was indicted and found guilty for a violation of chapter 82 of the Acts of the legislature of 1891, which provides for the weighing and measuring of coal at the place where mined before the same is screened. * * * The question to be decided by the court is whether the said two Acts are contrary to the constitution of this State, or to that of the United States, and null and void on account of contravention of either or both of those constitutions. * * * Upon the whole, therefore, we are not able to say that the legislature has transcended its inherent power to make reasonable police regulations, or that it has violated the article of the constitution of the State above quoted. We base this decision in this case—First, upon the ground that the defendant is a corporation and in the enjoyment of unusual and extraordinary privileges, which enables it and similar associations to surround themselves with a vast retinue of laborers, who need to be protected against all fraudulent or suspicious devices in the weighing of said coal or in payment of labor; secondly, the defendant is a licensee, pursuing a vocation which the State has taken under its general supervision for the purpose of securing the safety of its employees, by ventilation, inspection and governmental report, and the defendant, therefore, must submit to such regulations as the sovereign thinks conducive to public health, public morals or public security.

"We do not base this decision so much upon the ground that the business is affected by the public use, but upon the still higher ground that the public tran-

quility and the good and safety of society demand, where the number of employees is such that specific contracts with each laborer would be improbable, if not impossible, that in general contracts justice shall prevail as between operator and miner; and, in the company's dealing with the multitude of laborers, with whom the State has by special legislation enabled the owners and operators to surround themselves, that all opportunities for fraud shall be removed.

"The State is frequently called upon to suppress strikes, to discontinue labor conspiracies, to denounce boycotting as injurious to trade and commerce; and it can not be possible that the same police power may not be invoked to protect the laborer from being made the victim of the compulsory power of that artificial combination of capital, which special State legislation has originated and rendered possible. * * *

"Collisions between the capitalists and the workingmen endanger the safety of the State, stay the wheels of commerce, destroy public confidence, and at times throw an idle population upon the bosom of the community. Surely the hands of the legislature can not be so restricted as to prohibit the passage of laws directly intended to prevent and forestall such collisions. * * *

"If such legislation, directed against one class of corporations only, is not objectionable as class legislation, it is difficult to see why laws directed against other corporations, and directly intended to prevent popular disturbance and discontent, by regulating the manner of weighing coal, and prohibiting what is popularly known as the "plunkme" method of payment, should not be deemed a legitimate exercise of the police power of the State. * * *

"It seems clear to my mind that both of the Acts which we are now considering were passed with a view of cutting off oportunities for fraud, and therefore

they were fairly within the police power of the legislature. * * *

"This third section appears to my mind just as clearly within the exercise of a police power. It provides that all coal mined and paid for by weight shall be weighed in the car in which it is removed from the mine before it is screened, at such price per ton as may be agreed on by such owner or operator and the miners; and that coal mined and paid for by measure shall be paid for according to the number of bushels marked upon each car in which it is removed from the mine, and before it is screened, and the price paid for each bushel so ascertained shall be such as shall be agreed on as aforesaid.

"The objection urged against this provision is that it requires the operator to pay for all the coal that the miner digs, whereas, it has been customary, as has been alleged, and as was perhaps admitted by the counsel on both sides, to pay only for such coal as would not pass through the screen. The legislature evidently thought the screen a fraud, and, so far as it enters as an element in determining what coal resulting from his labor the miner shall be paid for, the screen is abolished. The law may have been unwise or injudicious; with that we have nothing to do. If it were passed by the legislature in the exercise of police power, we have no authority to annul the Act. * * *

"It is maintained, however, that these Acts are in conflict with the fourteenth amendment to the constitution of the United States: (1) in that they abridge the privileges and immunities of the citizens of the United States; (2) that they deny to the plaintiff the equal protection of the laws; and (3) that they deprive the defendants of their property without due process of law, contrary to the provisions of the first section of the fourteenth amendment.

"In the celebrated SLAUGHTER HOUSE CASES, 16 Wall., 36, it was held that it was only the privileges and immunities of the citizens of the United States which are placed by this clause under the protection of the Federal constitution, and that those of the citizens of the State, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. It is not necessary, therefore, further to discuss whether the citizens of this State, or the creature of the State, as the defendant in this case is, can derive any further protection from the paragraphs of the fourteenth amendment over and above that which it enjoys under our State constitution.

"We think the reasoning and authority of the SLAUGHTER HOUSE CASES a sufficient answer to the objection we are considering. The fourteenth amendment was never intended to strike down the police power of the State, nor to control its exercise, except in cases where it (the Act) amounts plainly to usurpation, and the wresting of private property from its legitimate owners without compensation. We see nothing in the legislation now under consideration which could properly be so characterized or regarded as in conflict with the fourteenth amendment."

In 1893 the legislature of Kansas passed an Act almost identical with that under consideration.

In Wilson vs. State, 61 Kansas Rep., 34, in construing the statute the Supreme Court said:

"On the argument and in the briefs much time and space were consumed in discussion of the question whether the Act under consideration affects the right of contract, and whether the law as it reads has a meaning that the wages paid to coal miners is to be measured by the gross output of the valuable product

mined and brought to the surface by the laborers employed therein. In our judgment, the law nowise affects the right to contract, and does not hinder or prevent the mine operator or miners from making such agreements as they choose concerning the amount of compensation to be paid for labor in mining coal. Nor does the Act prohibit the employment of miners at day wages, or make void contracts for the payment of wages based on the quantity of screened coal produced. In fact, the law permits complete freedom of action in the respect mentioned. The Act does, however, in positive terms, make it unlawful for any mine owner, lessee or operator of coal mines, employing miners at bushel or ton rates or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take away any part of the value thereof before the same shall have been weighed and duly credited to the employees at the legal rate of weights fixed by the law.

"Of the intent of the legislature in enacting the statute it is hardly necessary to inquire. We can see, however, a useful purpose to be accomplished. In the exercise of the police power the legislature may pass such laws as in its judgment are necessary, regulating the measuring or weighing of commodities. * * *

"The utility of the Act, if we have the right to enter upon such an inquiry, can be defended, for the reason that the weighing of the gross output from the mine gives information to the miner, whose labor has separated it from the general mass of the vein, concerning the result of his effort. He is advised how much in weight all grades of this fuel he has extracted from the earth in a day, a month, or a year, enabling him, when armed with this knowledge, to make contracts in the future based upon the actual information of the benefits the employer has in the past derived from his labor. Thus informed he may act intelligently, resting his demand for pay on the actual value

of his labor as shown by the calculated results of what he has theretofore accomplished. On the other side, the employer may also have this knowledge before his eyes when contracting with the miners for their services, enabling him to make an adjustment of wages based on known facts. By this system of weighing, deception as to the amount of coal mined is rendered impossible and fraud prevented. Standing in the light of such knowledge gained from established data, the miner may make a claim of right to wages he knows he can earn, fortifying his demand by reference to what he has done, as found recorded in the weighmaster's books.

"Further, it is important that the public should have within reach data sufficient to furnish information regarding the amount of coal produced from the mines within the State. A compliance with the laws provides means for the compilation of statistics showing the entire output of coal. The dissemination of knowledge concerning the wealth and material resources of a State is a laudable employment, and legislation which tends to accomplish or in any way assist in such work ought to be upheld and encouraged. For this object alone the Act in question is useful, and, being so, we can not say that the legislature did not have such purpose in view when the same was enacted. We agree with the Court of Appeals in saying: 'Counsel through their whole argument assume that the object of this Act is to regulate the rate of wages to be paid by mine operators to their employees. We think the assumption is unwarranted, and that, in so far as the arguments of counsel rest upon it, such arguments are irrelevant to the questions which properly arise in the case.'

"The law is devoted to other purposes than interference with or a regulation of contracts. It merely prohibits the screening of coal mined at ton or quantity rates beorfe the same is weighed. This is a legitimate exercise of the police power, coming properly within

the sphere of legislative action upon the grounds above stated.

"The judgment of the District Court and the Court of Appeals will be affirmed."

In Woodson vs. State, 69 Ark., 521, in sustaining a similar statute, the court used the following language:

"It is next said that the Act violates the constitution of the State and of the United States 'by restricting the right of contract, by taking property without due process of law, and by denying to certain operators and workers in coal mines the right of civil liberty and the pursuit of happiness.' In support of this contention, counsel for appellant has favored us with an able and entertaining brief, in which they discuss at considerable length the question of the right of the citizen to make contracts and acquire property. But that is a field into which we need not enter in this case; for, if we concede the contention of counsel that 'the right to contract in a lawful private business on terms satisfactory to the parties is a part of the natural liberty of the citizen which the legislature can not take away,' it does not follow that a corporation is equally exempt from legislative control in that respect. The citizen does not derive his right to contract from the legislature. The corporation does; and it possesses only such powers as may be conferred upon it by the legislative will, and these, under our constitution, are liable to be altered, revoked or annulled by the power that granted them. * * *

"Whether injustice has been done the incorporators depends upon the facts of each case in which an alteration or revocation of corporate powers has been attempted. But we do not see that the statute under consideration here is open to any such objection. It was made to take effect ninety days after its passage, and was prospective in its operation. It did not inter-

fere with vested rights or existing contracts, or deprive such corporations of any property possessed by them. The purpose of the Act, as shown in the title and the Act itself, was to protect a class of laborers against certain frauds which the legislature supposed might be perpetrated upon them in the process of screening, when the coal was not weighed until after it had been screened. The Act does not require the coal to be weighed when the laborer or miner is paid by the hour or day, or when he is paid by measure and not by weight. Even when the laborer is paid by the weight of coal mined, it does not attempt to regulate the price to be paid, but expressly leaves that to be settled by the agreement of the parties.

"There may be difference of opinion as to the wisdom of such legislation, or as to whether this law will have the effect intended by the legislature. Yet, even if we were convinced that the law was unwise, that would furnish no grounds for refusing to enforce it; for, 'it is not the province of the courts to supervise legislation, and to keep it within the bounds of propriety and common sense.' (Sutherland, Stat. Const., 283.) The question of the expediency of such a law is left alone to the legislature. Being satisfied that this control of these corporations engaged in the business of mining coal in this State is authorized by the power reserved in the constitution to 'alter, revoke or annul' their charters, we must hold this statute to be valid. A full discussion of this question of the legislative authority to control corporations under this reserved power in the constitution can be found in the following cases."

The statute construed in the Woodson case was amended in 1901, and the present Act adopted in 1905.

In its decision affirming the judgment of conviction of plaintiff in error the Supreme Court of Arkansas said:

"Under the provisions of the statute, the operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miners. The coal 'shall be accepted or rejected.' But 'if accepted' then it 'shall be weighed in accordance with the provisions of the Act.'

"The plain purpose of the Act therefore is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded. In other words, under this statute the miner having contracted with the mine owner or operator to produce a bushel, ton, or any other quantity of coal, at a certain price for the quantity produced, is entitled to have such quantity ascertained by the legal rate or system of weights adopted by the State of Arkansas, and that, too, without having the output or quantity of coal mined pased over any screen or other device which would take any part from the value thereof; i. e., which would reduce, as ascertained by the weight, the quantity of coal which he had actually mined under his contract. It is certainly within the police power of the State to adopt a uniform system of weights and measures and to require that all persons, whose business transactions require the use of same, to conform thereto. (Ch. CLIX Kirby's Digest of the Statutes of Arkansas. Baker vs. Hood, 53 Kan., 509; Wilson vs. State, 61 Kan., 34; State vs. Peel-Splint Coal Co., 36 W. Va., 802; Freund on Police Power, paragraphs 272 to 275.) The purpose of these statutes as ap-

plicable to coal mines is, as said by Mr. Snyder, 'to furnish a reliable means upon which to base the miner's compensation and to protect him in the payment for all coal he mines.' He, therefore, 'not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record of it.' (2 Snyder on Mines, 1675.)

"The operators are prohibited from using screens or other device 'which shall take away any part from the value thereof.' The words quoted show the intent of the legislature to protect the miner from the use of any device by his employer that will enable such employer to deprive the miner of the value of his labor on the basis of the quantity mined, as per contract.

"We see nothing in the statute under consideration that contravenes the provisions in our State and Federal constitutions securing to all persons liberty and equality of rights under the law. (State Cons., Secs. 2, 3, 8. Fed. Cons., 14th Amendment.)

"That the law applies only to mine owners, lessees, or operators of coal mines where ten or more men are employed under ground 'does not subject it to the interdiction of the above provisions.'

"The coal industry of our State, on account of the great number engaged in it and dependent upon it for a livelihood, and the still greater number who are affected by it, is of vast importance. Indeed, it can be truthfully said to be an industry of great interest to the public if not affected by a public use. It is eminently proper that the legislature should take supervision over it for the protection and benefit primarily of those who are engaged in it and dependent upon it; and, secondarily, for the welfare of those who are incidentally affected by it. This duty has been recognized and entered upon, as evidenced by laws intended to insure, as far as practicable, the safety, health and

comfort of the miner while engaged in his hazardous employment; and also to insure him, if possible, against any fraud or imposition that might or could be practiced upon him by an unscrupulous employer, if there should be one, who would defraud him of the fruits of his toil. (Kirby's Digest, Secs. 5337 to 5358 inclusive.) Legislation of the latter class is as much warranted under the police power as the former. As the object of such legislation is to protect those miners who need protection from fraud, broad latitude must be given the legislature in the matter of the classification of the mines and miners. The principle announced in the case of Consolidated Coal Co. vs. People, 185 U. S., 203, is applicable here."

Snyder, in his late work on "Mines," in commenting upon similar statutes, uses the following language:

"The purpose of these statutes being to furnish a reliable means upon which to base the miner's compensation and to protect him in the payment for all coal he mines, he not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record kept of it." (Sec. 1675.)

Plaintiff in error claims the statute to be in violation of the liberty of contract guaranteed by both State and Federal constitutions.

There can be no liberty of contract when such contract is in conflict with the public welfare. No one has the right to contract for an usurious rate of interest, or to do an act prejudicial to the public interests; or to form a monopoly; or to enter into a trust, or pool or combine; or to charge more than the

legal rate for carrying passengers or freight; or to demand or receive excessive charges for storing grain or handling live stock. Liberty of contract must give way to public welfare. The State's right to exercise its police power in restraint of liberty of contract has been recognized in innumerable instances. The legislative discretion of the State, in the exercise of the police power, must be, from the nature and necessity of the function, and the sovereignty of the body politic, indefinitely broad. Many laws restrict freedom of contract concerning matters not affected with any public use in the true sense, but only in the sense of the nature or extent of the private business being affected with public interests.

In this case the court must presume that the legislature in passing the screen law was acting for the public good, and that the law was enacted for the purpose of promoting certainty, and, by consequence, fair dealing between the operator and miner. It may not accomplish its object; but the court has no right to say that the law is void because, in their opinion, it may be impolitic, unwise or imperfect.

Many statutes which go much further than this in abridging the liberty of contract have been sustained by courts of last resort.

In Patterson vs. Endero, 190 U. S., 169, this court held that an Act of Congress making it a misdemeanor for a ship master to pay a sailor any part of his wages in advance was valid.

And so this court upheld a statute making it illegal to contract to pay employees in merchandise checks.

Harbinson vs. Knoxville Iron Co.,
183 *U. S.*, 13.

Also the statute prohibiting the employment of women in saloons or other places where liquor was sold was sustained by the Federal courts.

In re Considene, 83 *Fed. Rep.*, 157.

The Act of Congress prohibiting attorneys from contracting for a larger fee than $10.00 for prosecuting pension claims was held to be valid exercise of the police power.

Frisbie vs. U. S., 157 *U. S.*, 160.

So the statute of California, making it unlawful for employees to work in laundries between the hours of ten o'clock p. m. and six o'clock a. m. was sustained.

Soon Hing vs. Crawley, 113 *U. S.*, 703.

A statute prohibiting contract for more than eight hours work per day in mines is valid.

Holden vs. Hardy, 169 *U. S.*, 366.

The statute fixing maximum charges for storage of grain and prohibiting contracts for larger amounts is valid.

Munn vs. People of Ill., 94 *U. S.*, 113.

A statute requiring timber to be measured in a certain manner and declaring it to be a misdemeanor to measure or sell same in any other way was upheld.

Pierce vs. Kimball, 9 *Me.*, 54.

Same with reference to sales of cotton.

State vs. Moore, 10 *S. E. Rep.*, 143.

We might multiply instances without end, where statutes abridging personal liberty or freedom of contract have been sustained as a proper exercise of the police power, but deem it unnecessary to do so.

We believe the following, deducible from the recognized authorities, to be a proper definition or rather description of the police powers of a State.

The police power is that broad and comprehensive power by which the rights of the individual, both as to liberty and enjoyment of property, may be controlled in the interest of public welfare. Laws enacted in the exercise of this power, which interfere with the citizen's liberty or right of property are justified whenever

their object is to secure the comfort, safety or welfare of society. And in the exercise of this power the State is not confined to matters relating strictly to the public health, morals or peace, but there may be interference whenever the business interests demand it. A broad discretion is necessarily vested in the legislature, to determine not only what the public interests require, but what measures are necessary for the protection of such interests. While the legislative determination is not final, but it subject to review by the courts, still it is for the legislature to decide when such exigencies exist, and the courts can not set aside such statutes for the reason that it may be, in their opinion, unwise or unnecessary.

Does the Arkansas screen law come within the above rule? We think that there can be no doubt that it does. It protects the employee and prevents imposition and fraud. As said by the Supreme Court of Kansas in the Wilson case:

"By this system of weighing, deception as to the amount of coal mined is rendered impossible and fraud prevented."

In the Peel-Splint case, the Supreme Court of West Virginia said:

"The legislature evidently thought the screen a fraud, and as far as it enters as an element in deter-

mining what coal, resulting from his labor, the miner should be paid for, the screen is abolished. * * *

"The objects of the Act seem to be: first, to protect against negligence by inspection laws, in order to protect the miners in fulfilling contracts of labor as regards their health and lives; secondly, to protect them from fraud in measuring and paying for all their earnings.

"If the first object of protection, namely, to protect the lives and health, be a legitimate subject for legislative interference with contract relations between miners and the operators or owners, upon what conceivable grounds can it be maintained that the second object, namely, to protect against fraudulent practices, is not clearly within the scope of the police power of the legislature."

So in the Woodson case, the court said:

"The purpose of the Act, as shown in the title and the Act itself, was to protect a class of laborers against certain frauds, which the legislature supposed might be perpetrated upon them in the process of screening when the coal was not weighed until after it had been screened. * * * The object of the Act seems to be to secure to the miner pay for all coal mined by him, and in this manner prevent his employer from depriving him of a just reward for his labor."

Plaintiff in error contends that the Act does not come within the exercise of the police power of the State for the reason that it does not purport to protect the health, morals or safety of the public or of the employees of the coal companies. And the argument is made that the police power is limited to those objects.

The same argument was advanced by counsel in the case of C. B. & Q. Ry. vs. Ill., 200 U. S., 561. But this court there said:

"The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well being of the community apart from any question of the public health, the public morals or the public safety. Hence he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district and make them tillable or fit for cultivation. We can not assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

See also the very recent case of Bacon vs. Walker, 204 U. S., 311, where the validity of a statute of Idaho making it unlawful to herd sheep within two miles of a dwelling house was sustained by this court in the following language:

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a State, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into

the error exposed in Chicago B. & Q., R. Co. In that case we rejected the view that the police power can not be exercised for the general well being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate, and not offensive. Nor need we make extensive comment on the two mile limit. The selection of some limit is a legislative power, and it is only against the abuse of power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries. These may be the considerations that induces the statutes, and we can not pronounce them insufficient on surmise or on the barren letter of the statute. We may refer to Sifers vs. Johnson, 7 Idaho, 798, and Sweet vs. Baltimore, 8 Idaho, 431, for a statement of the practical problem which confronted the legislature and upon what considerations it was solved. We think, therefore, that the statutes of Idaho are not open to the objection that they take the property of plaintiff in error without due process of law, and pass to the consideration of the charge that they make an unconstitutional discrimination against the sheep industry.

"Counsel extend to this contention the conception of the police power which we have just declared to be erroneous, and, enumerating the classes discriminated in favor of, as cattle, horses, hogs, and even poultry, puts to question whether in herding or grazing sheep

'there is more danger to the public health, comfort, security, order, or morality, than the classes of animals and fowls above enumerated.' 'What,' counsel asks, 'are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily, and because of its unwarrantable character, work an injury to the public? And, if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted entirely free from such danger, or do such exceptions tend to reduce the general danger?' Contemplating the law in the aspect expressed in these questions, counsel are unable to see in it anything but unreasonable and arbitrary discrimination. This view of the power of the State, however, is too narrow. That power is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited."

If the Arkansas screen law was passed for the purpose of preventing fraud, or to secure some reliable means upon which to base the miners' compensation, or to promote the public convenience or the general prosperity, and has a tendency to accomplish all or any of said purposes, it is a valid exercise of the police power, though not purporting to deal with the public health, morals or safety.

Plaintiff in error argues that though the law might be valid if it applied to all coal companies alike, it is

void for the reason that its provisions are limited to companies employing ten or more men underground.

Freund, in his recent work on "Police Power," answers plaintiff in error's arguments so completely that we quote at length from that author:

"While an ideal or perfect system of equality might require a legislative treatment of all public dangers by measures exactly adequate to their menace, this is manifestly a standard which it is impossible to realize. * * *

"The method of discrimination most in accordance with the spirit of constitutional equality is that of abstract determination, where it can be applied. This would mean that the condition is defined by reference to the public interest which it affects and the degree of danger which it imports, so that all other dangers of the same kind and degree would be covered by the definition. A law which should provide that all articles made of compound material, where the compound is not known in the trade by a distinctive name, must, if exposed for sale, be labeled in such a manner as to show the ingredients and their proportion, would satisfy this standard. Manifestly, few police statutes are framed in such a general way. An approach to such generalization may, however, be found where the law defines by numbers or other measurable quantities. Where the degree of danger depends upon the extent to which some practice is carried, this would seem to be a just basis of discrimination. * * *

"In many cases, however, it is impracticable to define the required degree of danger in abstract terms, while it is easy to indicate it by reference to the particular business or other concrete form in which it appears. The dangers with which the police power copes are not divided into as many different kinds or degrees as there are economic or social groups or forms of

action; but these groups or forms are distinguished by a certain uniformity of practice, in which an evil may assume special magnitude which calls for regulative action by the State. Therefore there is a rough correspondence between group and degree of danger, and the greater degree of danger peculiar to a group will justify its being singled out for police restraint. Thus it is generally conceded that the operation of railroads is attended with so much risk of injury that special rules of liability are justifiable, and it is no objection that the danger is not or cannot be defined abstractly, without reference to the class. It may, however, be that the particular group is singled out simply because it happens to arouse public attention or because the restraint may serve some ulterior interest by which the business is affected. * * *

"For obvious reasons it is legitimate to distinguish between longer and shorter roads in the matter of safeguards against certain accidents which are more liable to happen on the former. By analogy, legislation for prevention of accidents in mines may except those which employ a very small number of miners. * * *

"It is not held to be unjust discrimination that the law singles out for punishment fraud committed against or in a particular kind of business. * * *

"An Act requiring glass screens for the protection of motormen on electric cars only, while no similar protection need be furnished on cable or steam cars, is sustained in Ohio. The court says it can not judicially know that similar means of protection are required on cable cars. The Supreme Court of the United States has sustained an Act limiting the time per day during which laborers may be employed in underground mines, dwelling upon the fact that the statute does not limit the hours of all workmen, but confines itself to employments which the legislature has deemed detrimental to health. * * *

"The foregoing synopsis of decisions shows the law in a formative state; the court asserts the power to condemn classification that seems unjust, but have not in their arguments proceeded much beyond general phrases of denunciation. It is easy to find very sweeping expressions in favor as well as against the power of classification. The Supreme Court of the United States has said 'the specific regulations for one kind of business, which may be necessary for the protection of the public, can never be just ground for complaint because like restrictions are not imposed upon other business of a different kind,' and, 'Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.' * * *

"The constant and immemorial practice of legislation santions regulations and restraints confined to particular classes of business. Nearly the whole of the former English economic legislation consisted of statutes, each of which dealt with one trade only, and the early American inspection laws singled out special classes of merchandise. It has never been intimated that all possible forms of mercantile fraud must be dealt with or none, or all sanitary dangers or none. It has always been characteristic of English legislation to proceed tentatively, step by step, and many important reforms could have been accomplished in no other way. Under the operation of the fourteenth amendment, the legislative power is certainly not as free in this respect as it used to be; and on the whole this restriction is a distinct gain, for it tends toward equality, and in a democracy, equality is the surest, and, in the long run, the only possible guaranty of liberty. But classification, and therefore class legislation, has not yet been abolished; it is merely placed under judicial control. The principles guiding such control must be evolved by further adjudication; it

seems, however, that the trend of decisions may be summarized in the following limitations. Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted; and where the restraint is general, with certain exceptions, the excepted classes must either be entirely free from the danger, or the exception must tend to reduce the general danger, or a distinct and legitimate public policy must favor the toleration of the evil under circumstances where it is outweighed by great benefits. The decisions of the Supreme Court of the United States seem to be in accordance with these principles."

Secs. 721, 724, 725, 727, 731, 735, 736, 738.

The right to classify corporations and place certain restrictions on one class from which others are exempt has been recognized by the courts from time immemorial. Discrimination is legal and legitimate where the object is to conserve the public interest. If the dangers to be apprehended from one class are greater than from another, the legislature may regulate the more dangerous class, while leaving the other classes unaffected by such legislation, or the legislature may divide corporations engaged in the same business into different classes and regulate separately with reference to each, or regulate one class only.

Take the railroad legislation of this State for example. A statute was passed a number of years ago, making railway companies liable for injuries to their

employees caused by the negligence of fellow servants, while other corporations of the State were not liable under the same circumstances. The validity of this statute has never been questioned, while similar statutes of Kansas and Iowa have been sustained by the Supreme Court of the United States.

In Mo. P. Ry. Co. vs. Mackey, 127 U. S., 205, the Kansas statute was attacked for the alleged reason that it was class legislation and discriminated against the railroads. In sustaining the Act Judge Field said:

"The objection that the law deprives railroad companies of equal protection is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be obtained by it, or the extent of its application."

Another Act was passed by the Arkansas legislature requiring railway companies to settle with their employees on the day on which they were discharged, but the Act did not apply to other corporations. This Act was sustained both by the Supreme Court of the State and by this court.

St. L. I. M. & S. Ry. Co. vs. Paul,
173 *U. S.*, 404.

Railroads are also regulated, controlled and discriminated against in accordance with the number of miles in operation or volume of business transacted.

Section 6611 of Kirby's Digest of Statutes of Arkansas provides that railroads fifteen miles in length or less may charge eight cents per mile; on lines over fifteen miles in length and less than seventy-five miles, five cents per mile only may be charged, while on roads more than seventy-five miles only three cents may be charged. This is an arbitrary classification and discrimination against roads more than seventy-five miles in length.

To adopt the argument of plaintiff in error, why should a road fifteen miles long be permitted to contract for eight cents per mile fare, while one sixteen miles can only charge five cents per mile.

Some other States classify railroads according to the volume of business done, permitting roads doing a small business to charge more than roads doing a large volume of business.

The Arkansas statute was sustained in Dow vs. Beidelman, 125 U. S., 680, the court saying:

"The legislature of Arkansas, by statute of April 4th, 1887, fixed the maximum fare that any corporation, trustees, or persons operating a line of railroad, might

charge and collect for carrying a passenger within the State, at eight cents a mile on a line fifteen miles long or less, five cents on a line more than fifteen and less than seventy-five miles long, and three cents a mile on a line more than seventy-five miles long. The line of the road of the plaintiffs in error is more than seventy-five miles long and they charged more than three cents a mile, and were therefore held to be subject to the penalty imposed by the statute for any violation of its provisions. * * *

"It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws. * * *

"Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

A statute of New York prohibiting railroads more than fifty miles long from heating their passenger cars with stoves was sustained by this court in the following language:

"The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable."

N. Y. Ry. Co. vs. People, 165 *U. S.,* 628.

In Budd vs. N. Y., 143 U. S., 517, the legislature of New York passed a statute providing that grain elevators should charge only five-eights of a cent per bushel for elevating wheat, and should charge only actual cost for handling the grain. The Act further

provided that it should apply only to elevators in cities having a population of more than one hundred and thirty thousand people. The Act was sustained as not in conflict with the fourteenth amendment to the United States constitution. It was also held that the discrimination in favor of elevators in smaller cities was not illegal.

See also to the same effect:

Mason vs. State, 179 *U. S.,* 328.

A statute was enacted in Tennessee providing that no misrepresentation or warranty should affect the validity of a policy of insurance, unless made with actual intent to deceive. The Act was held valid, though it applied only to certain classes of insurance.

Fidelity & Casualty Co. vs. Freeman,
109 *Fed. R.,* 847.

See also the following decisions upon the right of the legislature to discriminate between different classes of corporations and individuals.

Ford vs. Chicago Milk Shippers Association,
155 *Ill.,* 166.

Harding vs. Am. Glucose Co., 182 *Ill.,* 551.

Re Oberg, 21 *Or.,* 406.

State ex rel Chandler vs. Main, 16 *Wis.,* 399.

Mo. Pa. Ry. vs. Humes, 115 *U. S.,* 512.

Wurts vs. Hoagland, 114 *U. S.*, 606.

Mo. vs. Lewis, 101 *U. S.*, 22.

Sullivan vs. Hong, 82 *Mich.*, 548.

Covington Ry. Co. vs. Sandford, 164 *U. S.*, 578.

N. Y. Ry. vs. Bristol, 151 *U. S.*, 556.

Brown vs. Dakota, 153 *U. S.*, 391.

Lowe vs. Kansas, 163 *U. S.*, 81.

Duncan vs. Mo., 151 *U. S.*, 377.

Munn vs. Ill., 94 *U. S.*, 133.

Equal protection is not denied where the law operates alike upon all persons similarly situated.

Watson vs. Nervin, 128 *U. S.*, 578.

State vs. Schlemmer, 42 *La. Am.*, 8.

State vs. Moore, 104 *N. C.*, 714.

Ex parte Swann, 96 *Mo.*, 44.

Barbier vs. Connelly, 113 *U. S.*, 32.

Soon Hing vs. Crawley, 113 *U. S.*, 709.

Hayes vs. Missouri, 120 *U. S.*, 68.

Minneapolis & St. L. Ry. Co. vs. Beckwith, 129 *U. S.*, 26.

Ky. Ry. Tax Cases, 115 *U. S.*, 321.

Magoun vs. Ill. Trust & Savings Bank, 170 *U. S.*, 282.

Most all coal producing States have statutes requiring mining companies to file maps and plans of all workings in said mines; to furnish circulation of pure

air; to employ only sober and competent engineers; to have all cages covered, and shafts fenced; to have all coal correctly weighed and giving the miners the right to have a check weighman; to have all machinery examined periodically; to have break-throughs not more than a certain distance apart; to have all ropes used in hoisting examined daily, and that mines be examined by the State mine inspector at certain stated periods, and many other provisions for the safety of miners. These statutes are all similar, and most of them provide that the Acts shall apply only to mines working more than a certain number of employees.

In Arkansas and Indiana the statute only applies to mines working ten or more men, and in Illinios to mines employing five men or more. None of these statutes have been held void because they apply to some mines and not to others.

Plaintiff in error would argue that it was just as important for the protection of employees that the hoisting ropes used in mines employing nine men should be examined daily as in one employing eleven men. The same argument could be made with reference to fencing shafts and covering cages. These statutes have all been sustained as a legitimate exercise of the police power of the State for the protection of the employees.

Hancock vs. Yaden, 121 *Ind.*, 366.

Smith vs. State, 90 *Tenn.*, 575.

Consolidated Coal Co. vs. People, 185 *U. S.*, 203.

In the last case this court said:

"Another question is whether the Act, as amended in 1897, in so far as it discriminates as to penalties imposed upon some persons engaged in the mining business, and not upon others, is a proper exercise of the police power. It is true that the Act of 1897 amended the former law of 1895, by limiting its application to coal mines 'where more than five men are employed at any one time.' This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable, as it was in Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79, Sub. nom. Cotting vs. Godard, ante 92, 22 Sup. Ct. Rep., 30, in an Act defining what should constitute public stock yards, and regulating all charges connected therewith, was held to be unconstitutional, because it applied to only one particular company, and not to other companies or corporations engaged in a like business in Kansas, and thereby denied to that company the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a large scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that

precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for discrimination here.

"It is true that the Act of 1897 does not in terms declare that the Act of 1895 shall apply only to coal mines where only five men are employed at any one time, but merely exempts the owners of such mines from punishment for violations of the general law. No one, however, can read this Act, in connection with the prior Act of 1895, without perceiving an intention on the part of the legislature to exempt such mines from the scope of such Act. An Act which declares it to be unlawful for any person to operate mines of a certain class without first complying with all the conditions and sanitary regulations required under existing laws, and paying all inspection fees, and, in case of refusal, to make it the duty of the mine inspector, through the State's attorney, to proceed in behalf of the State against such person, to compel the discontinuance of such mine, is so plainly an exemption from the operation of the law of all other mines as to constitute a classification in their favor."

In the opinion on rehearing in State vs. Peel-Splint Co., 36 W. Va., 831, the court said:

"There was one point urged in argument for defendant which was not overlooked, but perhaps was not sufficiently dwelt upon in the opinion, and that was that the screening Act applies only to persons, companies or corporations operating a coal mine in which more than ten miners are employed. It is urged that this is 'class legislation,' a term so loosely and vaguely applied as to defy any critical analysis of its meaning. The distinction drawn in favor of the smaller operators would indicate that the legislature thought that the evils of fraud and danger of imposition did not extend

to the smaller classes of operators, and hence the remedy was not extended to their employees.

"It is impossible to see how this distinction renders the Act amenable to the charge of violating the fourteenth amendment to the Federal constitution. This is our opinion, heretofore expressed, and it is confirmed by a recent decision of the Supreme Court of the United States, published since our opinion was announced. In Budd vs. New York, 43 U. S., 517 (12 Sup. Ct. Rep., 468), the law of the State of New York, which was attacked as unconstitutional, was confined in its operation to cities having a population of one hundred and thirty thousand or more, and it was contended that this feature was in violation of the fourteenth amendment. To this contention the Supreme Court of the United States replied: 'It is further contended for the plaintiffs in error that the statute in question violates the fourteenth amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies only to places which have one hundred and thirty thousand population or more, and does not apply to places which have one hundred and thirty thousand population, and thus operates against elevator owners in the larger cities of the State. The law operates equally on all elevator owners in places having one hundred and thirty thousand population or more, and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the fourteenth amendment.'

"The same reasoning applied exactly and with equal force to the case now before us."

Plaintiff in error insists that the statute is unreasonable and void on that ground; that there is no evidence that it was intended to prevent fraud in the

measurement of coal, or that fraud was more likely to occur in large mines than in small ones employing less than ten men. In reply, we say that a very broad discretion is vested in the legislature to determine not only what the public interests require, but what measures are necessary for the proper protection of such interests. The legislature must decide when the exigency exists, and the courts can not set aside a statute for the reason that it may be in their opinion unwise or unnecessary.

As said by the court in Dow vs. Biedelman, supra:

"Our province is only to determine whether it can be done at all, and under any circumstances. If it can, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

So in Bacon vs. Walker, surpa:

"We do not enter, therefore, into the discussion whether the sheep industry is legitimate, and not offensive. Nor need we make extended comment on the two mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries.

These may be the considerations that induces the statutes, and we can not pronounce them insufficient on surmise or on the barren letter of the statute."

The court knows that a mine operating with less than ten men is in an experimental stage. Such a mine is only being developed. It is not entitled to be classed as a mine. It is simply an opening, shaft or slope. There is no danger of fraud in the operation of such mines. It is not necessary that they should be inspected, or that they should have scales. Such small mines are usually without spur tracks or switches. They have no tipple and therefore could not weigh the coal. Such mines almost universally employ laborers by the day. All development work is done by the day or by the yard. It is called piece work. There is no reason or necessity why mines employing less than ten men should have scales. The legislature knew this and wisely provided that the law should not apply to them. There is no opportunity for fraud in the operation of such a mine, and no reason why the coal coming therefrom should be weighed before being paid for. The exception of such companies was wise and just and certainly does not vitiate the statute.

The general public is probably more interested in the great coal fields of the country and the work and

development thereof than any other industry of the land. It is the foundation of all other industries. The great railway systems and all manufactures are dependent upon the supply of coal. Its use for domestic purposes is now almost universal. Without coal the wheels of industry are paralyzed and every branch of society must suffer. So important is the matter that the Chief Executive of the nation has recently withdrawn from sale coal bearing lands belonging to the public domain. Within recent years an extraordinary commission has been appointed to mediate between the operators and miners, and bring about a settlement of their differences. The State is vitally interested in the operation of her coal mines. It is not only the right of the legislature to protect the miners, but its duty to pass such laws as will prevent friction between the operators and employees, and will guarantee to every miner full pay for his services at contract price. The legislature had the right to say that the result of the miner's labor should be measured in an exact and uniform way. That the coal taken out by him should be weighed upon accurate scales, which are uniform the world over, and not left to the caprice of screens, which readily lend themselves to fraudulent practices. Every miner knows that sixteen ounces make a pound in all

the States of the Union, and they know equally well that no two screens will give the same result.

The statute does not prevent the operators from making contracts with their employees for digging coal. It does not attempt to fix the price of labor, or say how much the operator shall pay. It does not prevent contracts based upon the amount of lump coal taken from the mine. It simply says that there shall be no fraud or deception practiced upon the employee as to the amount of coal he has produced. If the mine runs high in slack the price can be adjusted accordingly. The public is too deeply interested in the matter to leave it to the operator to say how coal mines shall be worked. The State must see that there are no unnecessary grounds for friction between employers and employees.

While this country has been relatively free from internal strife and dissention, yet it is a fact of historical notoriety that almost every disturbance of the peace and tranquility of the nation of any magnitude has been the result of disturbed relations between large industrial corporations and their employees. The Act in question, to say the least of it, is an attempt to force the operators to treat the miners fairly in regard to the weight and measure of coal.

The State of Arkansas has adequate authority, under its police power, to protect all its citizens against fraud, and to enact all laws necessary to prevent disturbances between employers and employees, especially where the result of such disturbances may be so wide and far reaching as to affect every branch of society.

The statute is valid and the cause should be affirmed.

Respectfully submitted,

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